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Supreme Court of the United States

October Term, 1963

No. 16

BANCO NACIONAL DE CUBA,
Petitioner,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON THE MERITS OF COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA, MOVANT TO BE SUBSTITUTED AS RESPONDENT IN LIEU OF PETER L. F. SABBATINO

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September 30, 1963

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2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY (2d ed. 1960) 49

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YEAR BOOK OF INTERNATIONAL ORGANIZATIONS (9th ed. 1962-63) 35

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Supreme Court of the United States

October Term, 1963

No. 16

BANCO NACIONAL DE CUBA,

Petitioner,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMETT WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF ON THE MERITS OF COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA, MOVANT TO BE SUBSTITUTED AS RESPONDENT IN LIEU OF PETER L. F. SABBATINO

Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter "C.A.V.") files this brief pursuant to order of this Court dated June 17, 1963 (374 U.S. 820).*

Opinions Below

The opinion of the Court of Appeals (R. 152-89) is reported at 307 F.2d 845. The opinion of the District Court (R. 131-50) is reported at 193 F. Supp. 375.

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* In a separate brief to be filed herewith, also pursuant to the order of June 17, 1963, C.A.V. has supported its motion for substitution in place of Sabbatino, who is no longer State Court receiver of the assets of C.A.V.

Jurisdiction

The judgment of the Court of Appeals was entered on July 6, 1962 (R. 190). Petition for a writ of certiorari was filed on September 4, 1962 and granted on February 18, 1963 (R. 191) (372 U.S. 905). The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

Statutes Involved

There are no statutes or regulations of the United States directly involved. Petitioner's claim is based on Law No. 851, an enactment of the Cuban Revolutionary Government dated July 6, 1960, and Resolution No. 1, dated August 6, 1960, issued thereunder. Law No. 851 and Resolution No. 1 appear at R. 97-107 and are reprinted in the Appendix to Petitioner's brief at pages 61-71.

Questions Presented

1. Was not the Court of Appeals correct in holding that a foreign sovereign cannot require courts of the United States to enforce its laws which are in violation of international law?

2. Was not the Court of Appeals correct in holding that the Cuban acts relied on by Petitioner, seizing without compensation property of a particular class of aliens in retaliation against their homeland, constituted a violation of international law?

3. Irrespective of any violation of international law, should not courts of the United States refuse their process to a foreign state seeking to complete its taking of property of United States nationals confiscated by it in express reprisal against actions of the United States?

If the Court answers these questions in the negative, the following alternative question is presented:

4. Should not the case be remanded to the District Court with leave to C.A.V. to file an answer and interpose a counterclaim for damages resulting from the failure of Cuba to pay compensation for C.A.V.'s seized property and for appropriate further proceedings to determine issues of material fact?

Statement

The facts as they appear in the record and as found by the courts below are as follows:

By contracts dated February 5, 1960 and July 13, 1960 (R. 83) Farr, Whitlock & Co., a partnership located and engaged in business as a commodity broker and dealer in New York City (R. 42) (hereinafter "Farr"), purchased as principal from General Sugar Estates, Inc., a Cuban corporation and wholly-owned subsidiary of C.A.V. (R. 73), also a Cuban corporation but with virtually all of its capital stock owned by United States nationals (R. 99, 104,* 175), a certain quantity of sugar. Delivery of the sugar was to be made "free alongside steamer" (f.a.s.) to a vessel to be provided by Farr at Santa Maria (Jucaro), Cuba. Payment was to "be made in New York, in New York current funds by net cash, on presentation of necessary shipping documents . . . ." (R. 83). Farr in turn contracted to resell the sugar to a Moroccan customer (R. 75).

The sugar was loaded on a German vessel, the S.S. Hornfels, beginning on August 6, 1960. (R. 73). There is no wharf at Santa Maria (Jucaro), and normal practice is to place the sugar on barges which are towed out about four to six miles to the loading ship. (R. 88-9). It is not known exactly how far the Hornfels was from port in this instance.

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* The Court of Appeals referred to the stockholders as being predominantly United States "residents" (R. 154) and "nationals" (R. 175). Public Law 851 and Resolution No. 1, on which Petitioner predicates its case, are directed solely against "persons who are nationals of the United States of North America." (R. 99, 104).

On July 6, 1960 Congress amended the Sugar Act of 1948 by authorizing the President to reduce the sugar quota allotted to Cuba. (R. 144-45). On the next day the Cuban Council of Cabinet Ministers promulgated Law No. 851 dated July 6, 1960 empowering the President and the Prime Minister of Cuba to nationalize through forced expropriations "the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws" whenever the President or the Prime Minister of Cuba deemed it advisable or desirable. (R. 99).* Law No. 851 further provided that resolutions to be issued thereunder were not subject to appeal "as no remedial action shall be available thereagainst." (R. 101).

On July 16, the Department of State published a formal protest against Law No. 851 in its press release No. 397:

> "the Government of the United States considers this law to be manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory." (R. 57).

Between 6:00 A.M. on August 6 and 1:00 P.M. on August 9, all of the sugar in question was loaded on board ship. By Executive Resolution dated August 6, 1960, implementing Law No. 851, the Cuban Government expropriated the property of specifically named enterprises in which "nationals" of the "United States of North America" had a "predominating interest," including C.A.V. and its wholly owned subsidiary. (R. 104-05).

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* "Payment" for the property to be so taken was found by both courts below to be patently illusory (R. 148-50, 176-77); and, indeed, the illusory character of the payment has not been seriously questioned by the Petitioner.

After August 6, ships carrying Cuban sugar were not permitted to leave the "area" without the consent of the Cuban Government (R. 74). In order for Farr to have the sugar in question transported out of Cuba so as to meet its own commitments for resale, it was necessary for it to enter into a contract with Banco Para el Comercio Exterior de Cuba (Petitioner's assignor and a public corporation wholly owned by Cuba, R. 6-7) on August 11, the terms of which virtually duplicated those of the prior contracts between Farr and C.A.V.'s subsidiary, even to the point of being dated back to the original contract date (compare R. 83 with R. 81), and by means of which Petitioner's assignor was simply substituted as seller (R. 73, 75, 81, 133, 156). Upon the execution of these contracts, the S.S. Hornfels was permitted to sail and on August 12 it departed for Morocco. (R. 75, 85).

Also on August 12, an action was commenced against C.A.V. in the Supreme Court of the State of New York pursuant to Section 977-b of the New York Civil Practice Act in which a shareholder alleged that C.A.V. was a foreign corporation with assets and other properties in New York which had been nationalized and that therefore a receiver should be appointed to liquidate these local assets.* On August 16, by *ex parte* order, Peter L. F. Sabbatino was appointed temporary receiver of the New York assets pending determination of the action (R. 115-16). Farr was served with notice of this appointment on August 23 (R. 157). On August 26, Petitioner's representative, a French banking institution maintaining an office in New York City, presented for collection to Farr a sight draft for $175,250.69 and certain other documents including bills of lading related to the shipment of the sugar in question pursuant to instructions from Petitioner (R. 25, 75). Farr refused to accept the documents stating that only two of the necessary three copies of the shipping documents were included (R. 25). By letter dated August 26 Farr was advised by C.A.V. that it

* See *Schwartz* v. *Compania Azucarera Vertientes-Camagney de Cuba*, 39 Misc. 2d 63, 240 N.Y.S.2d 247 (Sup. Ct. 1962).

claimed ownership of the sugar covered by the bills of lading and that Farr should deliver to it either the bills of lading or the proceeds of sale (R. 20-21). By memorandum agreement also dated August 26, 1960, Farr agreed with C.A.V. to hold any proceeds it might receive in connection with the sale of the sugar until compelled otherwise by court order, and C.A.V. agreed to indemnify Farr against any claim with respect to the sugar if and when C.A.V. received said proceeds (R. 21-23).*

On the following Monday morning, August 29, Petitioner's banking representative presented the various shipping documents including all necessary copies to Farr for payment (R. 25-26, 42). There is a dispute between the parties concerning what occurred upon presentation. Petitioner's representative claimed that Farr requested time to examine the documents, asking it to return later in the afternoon for payment (R. 26). According to Farr there was no such conversation; the sight draft and bills of lading were delivered in the usual manner by ordinary messenger (R. 77). It is agreed, however, that later that day Farr negotiated the bills of lading to its customer in New York City and received the purchase price therefor (R. 75-76). When Petitioner's banking representative returned that afternoon to receive payment, it was informed by Farr that payment would not be made because Farr had been advised that C.A.V. claimed that the funds belonged to it (R. 26). Shortly thereafter, on the same day, an Order to Show Cause was served on Farr enjoining it from taking any action which might result in the removal from the State of New York of any property or assets of any kind belonging to or claimed by C.A.V. (R. 34, 44-45). Later in the afternoon, Farr delivered to Petitioner's repre-

* C.A.V. also agreed to defend at its own cost and by its own attorneys any suit against Farr concerning the sugar or the proceeds of sale except an action brought by the temporary receiver and to pay Farr 10% of the proceeds if and when it finally obtained clear title thereto (R. 22). However, Farr chose to use its own attorneys.

sentative a letter stating that it had received formal notification of the appointment of a temporary receiver of the New York assets of C.A.V. and an Order to Show Cause containing the aforementioned restraining order (R. 26, 49-50), and that under the circumstances it "felt obliged to retain the proceeds until a Court of competent jurisdiction shall have determined who has title to the sugar" (R. 76).

On October 10, 1960, Petitioner, a banking corporation organized under the laws of the Republic of Cuba to serve, *inter alia*, as the Financial Agent of the Republic, commenced the instant action in the United States District Court for the Southern District of New York against Farr and the Receiver (R. 5-6). Basically, the complaint alleged conversion by Farr of the bills of lading and the proceeds of the sugar to which the Petitioner was entitled as assignee of Banco Para el Comercio Exterior de Cuba (R. 7-8). The complaint also sought incidental injunctive relief against Farr and the temporary receiver and a judicial declaration that Section 977-b of the New York Civil Practice Act as applied was unconstitutional (R. 9).

By Order dated October 24, 1960, the Supreme Court of the State of New York ordered Farr to transfer to the temporary receiver the sum of $175,250.69 to be held subject to the refund of the Court in a fiduciary account; it was also ordered that Farr should deduct the sum of $1,314.38 due it as a commission from C.A.V. (R. 51-52, 79-80). Farr accordingly paid to the temporary receiver the sum of $173,936.31 (R. 64), and on October 31, Petitioner amended its complaint herein seeking to enjoin the temporary receiver from holding, retaining, or exercising jurisdiction over the said sum (R. 10). On the same day Petitioner moved for summary judgment against Farr and the temporary receiver (R. 11). Thereafter Farr and the temporary receiver cross-moved for dismissal of the complaint, Farr because of lack of jurisdiction over the subject matter (R. 59), the receiver because of failure to obtain leave from the appointing court

to sue him (R. 111-14). The District Court (Dimock, J.) found that it had jurisdiction and that there were no genuine issues of material fact (R. 134-138). It thereupon dismissed the complaint on the ground that the Cuban acts were unenforceable because they violated international law; thus, in its view, all other pending motions were rendered moot (R. 136, 150).

The District Court reasoned that its jurisdiction to examine the enforceability of the actions of Cuba was not affected by the so-called "act of state doctrine" if the acts violated international law (R. 140). The Court concluded that the expropriation involved did violate international law because it was retaliatory and not reasonably related to a valid public purpose, discriminatory against nationals of the United States, and did not provide adequate compensation (R. 142-150).

The Court of Appeals agreed that the District Court had jurisdiction and was free to examine the validity of the Cuban actions. (R. 160-73). The Court found the Cuban actions violative of international law in that Cuba failed "to pay adequate compensation for the property [taken] . . . *from a particular class of aliens, when the purpose for the seizure of the property* [*was*] . . . *to retaliate against the homeland of those aliens and when the result of such seizure* [*was*] . . . *to discriminate against them only*" (R. 181) (emphasis in original).

Subsequent to the Court of Appeals decision, the receivership of Peter L. F. Sabbatino in the state court action was terminated and the complaint therein dismissed.* By motion dated March 28, 1963 C.A.V. moved this Court to be substituted as the real party in interest in lieu of the receiver. After an initial Order postponing determination of said motion and a subsequent application by C.A.V., this Court on June 17, 1963 entered a supplemental Order granting leave to C.A.V. to file briefs in support of the motion and on the merits and to participate in oral argument on the merits.

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* *Schwartz* v. *Compania Azucarera Vertientes-Camaguey de Cuba*, 39 Misc. 2d 63, 240 N.Y.S.2d 247 (Sup. Ct. 1962).

SUMMARY OF ARGUMENT

Acts of a foreign sovereign which contravene well defined standards of international conduct, as well as the public policy of the forum, should not be enforced by United States courts. Particularly is this so when such enforcement is at the suit and in aid of that sovereign. No consideration has been advanced which requires courts unquestioningly to accede to the sovereign's demand merely because to do otherwise might touch upon issues involving relations between this nation and another.

On the contrary, it is the duty of courts to decide questions of law properly before them. This duty should not be cast aside because of rather fanciful fears that to mete out justice in a particular case involving a violation of international law by a foreign sovereign might somehow affect the possibility of correcting such violations by diplomacy at some indefinite time. In the case of Cuba, for example, redress might be indefinitely postponed by acceptance of such a view. Judicial sufferance and enforcement of foreign acts which violate international law would constitute an evasion of responsibility and a repudiation of this Court's view that international law is part of the law of the land and of the Nation's commitment to encourage respect for international law.

I.

The judiciary must decide justiciable causes, confined only by constitutional limitations, including a proper regard for the particular responsibilities of coordinate branches of the Government. No constitutional limitations upon the courts' jurisdiction are applicable; nor is this a case in which the Executive may properly assert exclusive competence.

Considerations of political expediency, grounded on the apprehension that deciding a case properly before the

Court may embarrass the conduct of negotiations with an antagonistic foreign government, at some future time, cannot justify judicial implementation of violations of international law. Thus to apply the "act of state" doctrine would be to send a new principle to join the "unsplendid isolation"* in which the sovereign immunity cases have been said to repose—without the justification, inherent in those cases, of avoiding a direct clash between rival sovereigns. The establishment of such a principle, withdrawing entirely the power of the judiciary to scrutinize foreign acts violating international law, would denigrate what this Court recognizes as part of the law of the land.

The *Oetjen*** and *Ricaud*† cases, chiefly relied on by Petitioner and the Government, neither require nor justify enforcement of the illegal Cuban acts involved here. Furthermore, the notable development of international law since those decisions should lead not to their extension but rather, if necessary, to their limitation.

II.

Confiscation of foreign-owned property, without compensation, violates a principle which has found overwhelming acceptance among nations. Occasional deviation from this principle does not derogate from its vitality, any more than an act of piracy undermines the validity of international law against piracy. Here there was no "general and impersonal" expropriation (occasionally suggested as a possible exception to the general rule), but a specific act of reprisal, which was exclusively aimed at—and affected—United States nationals. Since most of the stockholders are United States nationals, the fact of Cuban incorporation of C.A.V. cannot be used to mask the issues of international law involved.

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* Cohn, *Waiver of Immunity*, 35 BRIT. YB. INT'L L. 260 (1958).
** 246 U.S. 297 (1918).
† 246 U.S. 304 (1918).

III.

Quite apart from the foregoing contentions, the judgment of the court below dismissing Petitioner's complaint should be sustained on the ground that the Cuban acts violated the public policy of the forum. United States courts should not be utilized by the foreign sovereign to complete its taking of property of United States nationals confiscated in retaliation against the United States.

In order to complete its taking in this case, it was necessary for Cuba to extend its sovereignty beyond its own territory and to invoke the aid of United States courts to extract payment in New York of a commercial obligation from a New York debtor. The acts on which Petitioner's claim is based were avowedly fashioned to discriminate against the property interests of "nationals of the United States of North America" (R. 104). In this diversity case the public policy of New York and of the forum would preclude recovery. This policy is in accord with "those principles of international law which have long been accepted by the free countries of the West," as the State Department itself has formally announced (Press Release No. 397, R. 57), and hence cannot be dismissed as mere parochialism.

IV.

Alternatively, should this Court consider the judgment of the courts below to be in error, a reversal of the judgment should be coupled with leave to C.A.V., the real party defendant in interest, to intervene and file an answer to the amended complaint and to interpose a counterclaim for damages arising out of the taking of C.A.V.'s assets by Cuba without adequate compensation and for further proceedings to determine issues of material fact, the determination of which is unnecessary if the summary disposition below was correct.

I.

COURTS OF THE UNITED STATES SHOULD NOT ENFORCE ACTS OF A FOREIGN STATE WHICH VIOLATE INTERNATIONAL LAW.

A. The "Act of State" Doctrine Does Not Require Our Courts To Give Automatic Effect to Acts Which Violate International Law.*

We submit that the courts below were correct in holding that the "act of state" doctrine did not require them to enforce the Cuban actions expropriating C.A.V.'s property, since those actions violated international law. This result is supported by many commentators and is also in harmony with decisions of courts in other countries. Furthermore, it represents a proper view of the place which international law should have in current American jurisprudence.

The argument for Petitioner and for the Government as *amicus* depends primarily upon decisions which did not involve a sovereign plaintiff and which antedate much of the development of international law and the present concern with extension of the "rule of law" among and within nations. It denigrates the duty of the courts to enforce international law as a part of our jurisprudence.

In so far as Petitioner and the Government seek to make the Executive the sole judge of what "acts of state" the courts may review, they depend upon views of what are "political questions" which antedate the Court's decision in *Baker* v. *Carr*, 369 U.S. 186 (1962). As we shall show, the considerations advanced in those briefs for the courts deferring completely to the Executive in such matters would emasculate the judicial function. Furthermore, they involve conceptions of the delicate sensitivity of negotiations in modern diplomacy which seem to be largely unreal and also fears of the consequences of judicial decisions on matters of principle which are largely illusory.

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* This point is well developed in the *amicus* brief for The Association of the Bar of the City of New York, which also shows that the Cuban actions in question clearly violated international law. The *amicus* brief for the American Bar Association also deals effectively with the latter point.

No authoritative case, domestic or foreign, holds that courts of the forum are bound to recognize acts of foreign states which violate international law. 1 OPPENHEIM, INTERNATIONAL LAW 267-68 (8th ed., H. Lauterpacht, 1955) states:

> "Whatever may be the rule of International Law as to the duty of States (and their courts) to recognize the effects of foreign legislation within the foreign country concerned, it would appear that there is no such obligation with respect to foreign legislation, whatever the place of its purported effect, which is in itself contrary to International Law."*

European and other foreign authorities collected in Appendix I hereto not only demonstrate that the "act of state" doctrine for which Petitioner and the Government contend is not a rule of international law, but also that it is not recognized, even in the absence of an international law violation, as a barrier to judicial inquiry.**

The holdings of several cases in the Fifth Circuit have approved and applied the decision of the Court of Appeals in this case, despite Petitioner's suggestion to the contrary (Br. p. 15, n.4). *Menendez Rodriguez* v. *Pan American Life Ins. Co.*, 311 F.2d 429 (5th Cir. 1962), *petition for cert. pending*, October Term, 1963, No. 67; *Menendez* v. *Aetna Ins. Co.*, 311 F.2d 437 (5th Cir. 1962) (per curiam), *petition for cert. pending*, October Term, 1963, No. 68; *Tabacalera Severiana Jorge, S.A.* v. *Standard Cigar Co.*, 311 F.2d

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* This view is supported by the authorities collected in n. 3 at p. 7 of the Government's *amicus* brief and a number of others with which it has seemed unnecessary to burden this Court.

** See also the pertinent authorities collected in Appendix I to the *amicus* brief for The Association of the Bar of the City of New York. The three European cases which Petitioner has cited at pp. 13-14 of its brief for a contrary view do in fact support the proposition that there is no European act of state doctrine. In *Societe Hardmuth*, Court of Appeals of Paris (1950), 44 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 500 (1955), 79 JOURNAL DU DROIT INTERNATIONAL (Clunet) 1200 (1952), the court held that a Czechoslovakian expropriation had no extraterritorial effect on a nationalized company's property located in France. The court did hold, however, that the seizure of the company's trademark and industrial property rights would be recognized and protected in France as rights of the nationalized enterprise. But this holding was expressly based on the Convention for the Protection of Industrial Property Rights of Paris of March 20, 1883 and of the Convention of August 17, 1923.

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438 (5th Cir. 1962) (per curiam), *petition for cert. pending*, October Term, 1963, No. 78. The Court of Appeals, in discussing the act of state doctrine in the *Rodriguez* case, said of the Court of Appeals decision in the instant case:

> "Fully cognizant of the sensitivity of the Court's role and carefully containing its sweep, the Court affirmed the dismissal of the complaint on summary judgment. We quote rather copiously from this opinion for it states well the basis for our determination that these complaints cannot be dismissed on the Act of State doctrine. . . . The point of convergence of these cases is clear: Our courts are not compelled by the Act of State doctrine to give force and effect to the decrees of the Castro government in Cuba." 311 F.2d at 435-36.

Broad statements in some early American and English cases which are quoted to support a rigid application of the "act of state" doctrine are dicta derived from cases in which the immunity of a sovereign, his agent, or his property was principally at issue.*

In *Underhill* v. *Hernandez*, 168 U.S. 250 (1897), defendant was a "military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States." *Id.* at 254. The broad rule announced by Mr. Chief Justice Fuller that "[e]very sovereign State is bound to respect the independence of every other sovereign State,

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In *De Keller* v. *Maison de la Pensee Francaise*, Civil Tribunal of Seine (1954), 82 JOURNAL DU DROIT INTERNATIONAL (Clunet) 119 (1955), [1954] Int'l L. Rep. 21, an attempt was made by heirs of a Russian art collector to sequester, pending determination on the merits, paintings which had been seized without compensation by the Soviet government in 1918 and which had been brought to Paris

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* "The doctrine of immunity for acts of state was based on an analogy from the immunity given to the foreign sovereign and his agents and property. Never clearly analyzed in the early cases, the distinction between the two situations was gradually blurred until the same reasons were advanced to justify the two principles." Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 850-51 (1959).

and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," was obviously a reference to the principle of sovereign immunity—the defendant was in fact an agent of the revolutionary government.*

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for exhibition. Although the court denied sequestration, it did exercise its discretion in testing the Soviet decree under standards of French public policy. In addition, the court stressed the fact that the proceedings had not been instituted against the proper defendants. It may also be noted that more than thirty years had elapsed since the taking, and that according to Article 2262 of the French Civil Code, all actions are subject to a thirty-year statute of limitations.

N.V. Verenigde Deli—Maatschapijen and N.V. Senembah Maatschappij v. *Deutsch—Indonesische Tabak-Handelsgesellschaft m.b.H.*, Oberlandesgericht Bremen (1959), [1959] AUSSENWIRTSCHAFTSDIENST DES BETRIEBS—BERATERS, 272 (excerpts); decision reported by *Domke, Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305 (1960), was simply a case in which the court denied a motion for preliminary injunction on the ground that the Dutch companies had not shown any property right in the seized tobacco under the Indonesian law regarding plantation rights. In the course of stating auxiliary reasons (*"Hilfsbegruendung"*) for its decision, the court indicated that the Indonesian taking did not violate international law because it was not discriminatory and did provide for compensation. The court clearly recognized that it had the discretion to inquire into a foreign act of state to determine whether it was contrary to the public order of the forum. Further, the court's dictum that it was not obliged to disregard a foreign act if it violated international law was only another expression of the overriding significance of public policy in German courts.

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* Immediately after stating this rule, Mr. Chief Justice Fuller said:

> "Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact." *Id.* at 252.

See also the opinion below, 65 Fed. 577 (2d Cir. 1895) at 579, for another reference to "the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof."

The New York case of *Hatch* v. *Baez*, 7 Hun. 596 (N.Y. Sup. Ct. 1876), which Petitioner cites for the view that the "act of state doctrine" is itself part of international law (Pet. Br. at p. 17), was actually a sovereign immunity case in which the issue for decision was whether the defendant as President of St. Domingo was amenable to the jurisdiction of the court:

> "We think that, by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory. Each State is sovereign throughout its domain. The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St. Domingo which belongs to the executive department of that government. *To make him amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country.* . . . [T]he *immunity of individuals from suits brought in foreign tribunals* for acts done within their own States, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law". *Id.* at 599-600 (emphasis added).*

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* In the *Hatch* case the court properly noted that in the case of *Duke of Brunswick* v. *King of Hanover*, 2 H.L.C. 1 (1848), cited by the Government at p. 14, n. 6 of its *amicus* brief and by Petitioner at p. 14, n. 3 of its Brief:

> "The adjudication was put upon the principle, that no court in England could entertain questions to bring sovereigns to account for acts done in their sovereign capacities abroad." *Id.* at p. 600.

Two other cases cited by the Government at p. 14, n. 6 of its brief also dealt primarily with a foreign sovereign's personal immunity. *The Santissima Trinidad and The St. Ander*, 20 U.S. (7 Wheat.) 268 (1822) involved the immunities belonging to foreign public ships in our ports, and *L'Invincible*, 14 U.S. (1 Wheat.) 532 (1816) involved the immunity which a sovereign commission confers on a private vessel.

Unqualified statements as to total immunity may well be justified in those cases in which the foreign sovereign is "haled into court as a defendant." *National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955). Considerations of "comity" and of the "highest expediency" are said to militate against subjecting an unwilling sovereign to the process of the forum and compelling him to defend the validity of his acts before the courts of another sovereign. *Underhill* v. *Hernandez*, 65 Fed. at 579; see, *e. g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943); Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607-08 (1962).* By very definition, immunity in this context means that defendant is totally exempt from the jurisdiction of United States courts, which therefore never reach the problem of inquiring into the validity of particular acts of state. See, *e. g.*, *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 137-38 (1812); Zander, *supra* at 834. But in cases such as *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918); and *Bernstein* v. *Van Heyghen Freres S.A.*,** 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947), in which a party other than the sovereign is sued by the original owner of particular goods or his assignee, and title is in issue because of a questioned taking by the State, reliance upon unqualified language from

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* "[Because of] the equality and absolute independence of sovereign States, . . . every sovereign becomes the acknowledged arbiter of his own justice, and cannot, consistently with his dignity, stoop to appear at the bar of other nations to defend the acts of his commission agents, much less the justice and legality of those rules of conduct which he prescribes to them." *L'Invincible*, *supra* at 536.

** This case has been criticized as "[p]robably the most extreme and objectionable application of the [act of state] doctrine . . . ." Zander, *supra* at 832. Furthermore, it did not involve any problem of violation of international law and, in no aspect, can it be regarded as controlling here.

sovereign immunity cases is misplaced*; the problem is a different one. In the latter cases, there is no direct confrontation with the person of the foreign sovereign in the domestic forum; there is no theoretical reduction of his rank to that of ordinary citizen, responsible to ordinary processes. Any "affront" which may be said to result is at most remote and does not involve any degradation from sovereign status. In such cases, the courts of the forum are called upon merely to review in private litigation a completed transaction involving at some prior point the completed action of the foreign sovereign.** No effort is

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* Even where the sovereign is itself a party defendant, the modern trend, both judicial and executive, has been to limit, rather than to extend, the area of immunity. For example, in the case of *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945) this Court refused to recognize the immunity of a vessel owned but not operated by a foreign state. In the "Tate Letter" of 1952, 26 Dep't State Bull. 984, the Acting Legal Advisor of the Department of State announced that in the future the Department would suggest immunity for a foreign state only with regard to public or governmental acts (*jure imperii*) and not private or commercial acts (*jure gestionis*). The immunity of a foreign sovereign has also been limited in those cases in which a sovereign has sued as plaintiff in our courts and has been held to be subject to counterclaims, related or unrelated. See *National City Bank* v. *Republic of China*, *supra*.

** According to Hjerner, *The General Approach to Foreign Confiscations*, 2 SCANDINAVIAN STUDIES IN LAW 179, 204 (1958) judicial review of foreign acts of state does not constitute a significant affront to the foreign sovereign.

> "The sacrosanctity of foreign acts of state . . . is a specifically Anglo-American doctrine having its origin in old English constitutional law and cannot be accepted as a base for a general theory about the effects of foreign confiscations. To this great and complicated question there is only space here to stress the misleading character of the very frequent statements that not to recognize an act of a foreign state would amount to sitting in judgment on acts of the foreign state. Courts outside the foreign country, however, do not rehear the case once it has been decided by the act of the foreign state—they only have to decide whether out of the law *they* are administering, they want to attribute any effects to the foreign act and, if so, what effects. They cannot reasonably be said to impair the foreign sovereignty thereby and it is difficult to find any settled state practice or rule of international law precluding one state from attributing or not attributing any effects whatever to acts of another state." (Emphasis in original)

made to degrade the sovereign or to undo the sovereign act; the sole question is how far his action is to be given effect outside the territory over which he is sovereign. There is jurisdiction over the person of the defendant and, whatever the outcome, the sovereign goes about his exercise of sovereignty without interference from the court.

Recognition of these acts without examination cannot be predicated on any principle of sovereign immunity; it must seek justification in considerations of such overriding significance as to require abstention from the normal functions of judicial inquiry. Such considerations do not exist in this case.

B. Automatic Recognition of Foreign Acts of State is Limited to Certain Cases Supported by Considerations Not Here Present.

Laying aside the sovereign immunity principle as inapplicable, and giving little weight to early, unelaborated dicta, the fact is that recognition of foreign acts of state has been confined to those cases in which one or more of the following considerations justified such recognition: (1) the traditional concept of territorial sovereignty (*Underhill* v. *Hernandez*, 168 U.S. 250 (1897)),* (2) a desire to promote the security of titles in international trade (*Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940)),** and (3) aspects of the "political

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* "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." 168 U.S. at 252.

** "[The act of state doctrine] is not entirely a matter of comity. Persons who dealt with the former Spanish government are entitled to rely upon the finality and legality of that government's acts, at least so far as concerns inquiry by the courts of this country." 114 F.2d at 444.

question" doctrine (*Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918)).*

1. Territorial Sovereignty

No affront to the territorial sovereignty of the Republic of Cuba is involved in the case at bar. When a State seeks to affect the rights of aliens, its ability to act is circumscribed by overriding principles of international law. The application of these principles, which by definition impinge on the exercise of sovereign power, can hardly be said to constitute an "affront" to the "sovereignty" of a State acting in disregard of international law. See EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 65 (1928); Mann, *International Delinquencies Before Municipal Courts*, 70 L.Q. REV. 181, 198 (1954). Further, the acting State has here sought in effect to reach into the forum to consummate its act. In the words of Resolution No. 1, Cuba "subrogated" itself "in the place and stead of" C.A.V.'s subsidiary with respect to the latter's rights as seller against Farr (R. 105).** This right to payment matured upon presentation to Farr in New York of the sight draft and the requisite shipping documents (R. 75).† Cuba is now seeking to enforce the right to payment in the United States, and as one writer has stated:

> "Nothing in either international law or municipal law requires a judge to condone or implement a foreign international wrong by extending its operation to the forum." Zander, *supra* at 842.

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* "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." 246 U.S. at 302.

** See Hjerner, *supra* at 188 discussing generally the confiscation of a right to payment.

† "The case concerns the right to the proceeds from the sale of sugar originally owned in Cuba by a Cuban corporation . . . ." Gov't Br. p. 4.

Here it seems clear that Petitioner is seeking the affirmative aid of our courts to effectuate this expropriation. The brief of counsel for respondent Farr will argue that a foreign sovereign may sue in courts of the United States only as a matter of "comity" and that in the absence of comity, as here, the complaint must be dismissed. The brief on behalf of Farr will also argue that the "act of state" doctrine cannot be used to obtain affirmative relief, and that the seizure here involved is in the nature of a public law which, like a criminal penalty (*Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265 (1888)) or revenue law (*Moore* v. *Mitchell*, 30 F.2d 600 (2d Cir. 1929), *aff'd on other grounds*, 281 U.S. 18 (1930)), should not be cognizable in our courts. We leave those points, with which we agree, for presentation in the brief of Farr's counsel.

2. Protection of Security of Titles

It is submitted that considerations regarding protection of the security of title to goods in international trade are not present in this case. Petitioner is no innocent purchaser from a confiscating sovereign, but the confiscator itself. Thus, there is no relevance to arguments which have been made in the past that, unless courts are precluded from inquiring into the enforceability of foreign acts of State accompanied by a sale to third-party purchasers, the resulting insecurity of titles will discourage and impair the free flow of goods and services among nations.*

However, the Government has suggested that to admit of an exception to the act of state doctrine, even in the instant case, would indirectly weaken the international security of titles, thereby disrupting international commercial transactions (Gov't Br. p. 27). On the contrary, it is believed that security of titles and international trade will ultimately be promoted by the rule here contended for. Refusal to enforce confiscatory acts of a foreign state because they violate international law will inevitably result in (a) putting foreign sovereigns on notice that goods so confiscated are to that extent unmarketable, thus achieving an economic restraint on such violations, and (b) encouraging

* See, *e.g.*, Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 Am. J. Int'l L. 141, 148 (1960); *Banco de Espana* v. *Federal Reserve Bank*, *supra*.

investment in foreign markets by reassuring potential investors that their economic interests cannot be wiped out with impunity in total disregard of standards of international conduct.

None of the dire consequences imagined by Petitioner or the Government seem likely to occur in the real world in which the decision would be made.*

3. Political Question

In inquiring into the validity of the Cuban acts, the court below did not decide a "political question." Rather, it was exercising its jurisdiction to decide "Cases" or "Controversies" within the meaning of Article III of the Constitution. Here there was no executive agreement, treaty, or other valid exercise of constitutional power by a political branch of the government which could remove the case from the competence of the court.

In *Oetjen* v. *Central Leather Co., supra,* this Court adverted to the principle that:

> "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." 246 U.S. at 302.

But recently, in reviewing the "political question" doctrine, this Court characterized the *Oetjen* language as unduly "sweeping" and declared that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). Thus it can now be said that even if a case "touches foreign relations," as long as jurisdiction

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* The rule for which we contend need not prevent the courts in appropriate cases from affording protection to purchasers in international trade. For example, as the Government concedes, "even if an act of state should be held invalid . . . the applicable property law might still protect the title of a bona fide purchaser." (Gov't Br. p. 38)

has been properly invoked, the Court has a duty to decide judicial questions.*

In *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), this Court declined to give controlling effect to what appeared to be State Department representations that application of a Federal statute to a leased military base in Bermuda would embarrass relations with Great Britain. And in *Anderson* v. *N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942), in which the State Department had requested the New York Court of Appeals to give extraterritorial effect to wartime decrees of the Netherlands government in exile, the court indicated that although the legitimacy of the Government was a political question, the scope and effect of its decrees in New York was for the judiciary. See also *Banco de Espana* v. *Federal Reserve Bank, supra*; see Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168, 171 (1946).

Cases involving an exercise by the political department of a constitutional power in the "political" arena, generally relied upon by Petitioner, are clearly distinguishable from the situation here. For example, in *United States* v. *Pink*, 315 U.S. 203 (1942) and *United States* v. *Belmont*, 301 U.S. 324 (1937), the claim of the United States as assignee of the acting Soviet state was grounded upon an agreement between the two countries, the "Litvinov Assignment," which, reflecting the explicit interposition of executive action, this Court was bound to recognize. See also *Shapleigh* v. *Mier*, 299 U.S. 468 (1937) (involving an executive agreement establishing by convention an Interna-

* In a dissenting opinion in *Colegrove* v. *Green*, 328 U.S. 549, 572-73 (1946), Mr. Justice Black recognized the elusive character of the "political" label and the need for judicial protection of certain so-called political rights: "It is true that voting is a part of elections and that elections are 'political.' But as this Court said in *Nixon* v. *Herndon*, [273 U.S. 536] . . . it is a mere 'play upon words' to refer to a controversy such as this as 'political' in the sense that courts have nothing to do with protecting and vindicating the right of a voter to cast an effective ballot."

tional Claims Commission between the United States and Mexico); *Bernstein* v. *Van Heyghen Freres S.A.*, 163 F. 2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947) (involving the so-called "Four Power Declaration" concerning claims against the former Nazi Government).*

Assuming courts are competent to ascertain and apply the principles of international law,** see *The Paquete Habana*, 175 U.S. 677 (1900); *Hilton* v. *Guyot*, 159 U.S. 113 (1895); see also Jessup, *supra* at 171-72; Zander, *supra* at 842, no other aspect of the political question doctrine should militate against judicial decision in this case. In urging that the act of state doctrine be applied in this case without any limitation whatever, the Government in its *amicus* brief has suggested five "considerations" or aspects of the political question doctrine upon which its

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* *Rich* v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961), cited by Petitioner, is a sovereign immunity case. There the Government had filed a certificate of immunity with respect to the vessel (*The Bahia de Nipe*) and its cargo, both owned by the Cuban Government. In addition to the principle of sovereign immunity, which alone was dispositive, support for the court's conclusion as a matter of urgent national interest may also be found in circumstances set forth in detail in the Government's Memorandum in Opposition to the Application for a Stay in that case. Shortly before the defection of the *Bahia de Nipe* crew, the United States and Cuba had informally agreed to return any property "hijacked" from the other. On the day before the *Bahia* incident, Cuba had complied with the agreement by returning a hijacked American airliner, so that the court was indeed compelled by urgent considerations to dismiss the libels as it did.

** We disagree with the view of the Government's *amicus* brief which seems to treat the Executive as the only branch of government competent to identify principles of international law and cases of their violation. *Cf.* Gov't Br. p. 30:

> "The short of it is that it is essential, from the standpoint of conducting foreign relations, that the position to be taken by the United States regarding the legality of the acts of a foreign government within its jurisdiction should be determined by the Executive, not by individual state and federal judges."

contention is based. These may be summarized briefly as follows:

(1) American judicial decisions applying international law "would have, at best, only occasional application to foreign acts of state" and would not "serve to institute an international rule of law";

(2) Decisions failing to give effect to foreign acts of state would disrupt international transactions;

(3) Decisions by American courts in cases involving foreign acts "would not be likely to advance the development of principles of international law" because they will be viewed as the projection of "parochial American views partisan to American national interests";

(4) "[E]xecutive diplomatic action may be seriously impeded or embarrassed by American judicial decisions which undertake, in domestic law suits, to pass upon the validity of foreign acts"; and

(5) Even where the Executive has taken a position condemning a foreign act of state, courts should not feel that they are thereby released from any judicial restraint imposed by the act of state doctrine.

(Gov't Br. pp. 26-34)

We submit that none of these largely theoretical considerations warrants the undiscriminating application of the act of state doctrine contended for.

First, even accepting *arguendo* the Government's contention that a judicial decision might not as such serve to institute an international rule of law, the argument is beside the point. Parties who are properly before the court are entitled to the relief they justly seek, regardless of whether their being before the court is "fortuitous."* But beyond

* "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana, supra* at 700.

this, if the courts of this country disallow claims based on foreign statutes, judicial decisions, or executive pronouncements which violate international law, foreign states contemplating illegal seizures and those who would traffic in goods obtained in violation of international law would be on notice that the courts of this country will not allow the fruits of such action to be enjoyed. This would be particularly so when export industries are seized. Respect for international law in American courts is certainly more likely to advance respect for international law elsewhere than to impede it. Because the accidents of litigation give only occasional opportunity for such advancement, it does not follow that such occasions should be foregone.

Second, in connection with the assertion that a non-application of the act of state doctrine would be "disruptive" of international transactions* we point out once again that this case does not, as other so-called act of state cases sometimes do, involve any question of preservation of security of titles. Nor is the fact that executive and legislative action against Cuba may provide a "more certain and comprehensive impact" any reason to ignore the impact which can reasonably be expected from judicial exclusion of the United States as a market for the resale of confiscated goods; for it would inevitably follow that such a decision would have a deterrent effect upon both purchasers and confiscating states supplementing executive and legislative action taken to this end.** Courts do not generally abdicate because legislative or executive action in the same general field may also be available.

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* For a concise refutation of this argument, see Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607, 1617-18 (1962).

** It may be noted in passing that this second consideration pointed to by the Government appears somewhat inconsistent with its first consideration; for if disruptive effects would result from a non-application of the act of state doctrine in our courts, any such disruption would be *de minimis* since, if the Government's first point is valid, such cases will occur in the United States only sporadically.

Third, how decisions by American courts may be viewed abroad should be irrelevant; it should not lightly be assumed that the courts will not make "dispassionate applications of neutral international principles." Nor is the judicial function to be surrendered because hot heads may not at once respond to its cool reason. While the acting state is not likely to regard such a decision as purely objective, other states surely cannot be insensitive to the justness of a decision disallowing effect to confiscations which are retaliatory, discriminatory, and without adequate compensation. Particularly is this so in view of the fact that the vast majority of States hold to identical or similar views (See Appendix II).

If it is at all relevant to consider how an American decision in this matter may be viewed abroad, we suggest that a contrary decision may well be regarded, particularly in the states of South America, as a long step backward in our dealings both with Cuba and the political doctrines which that state overtly seeks to spread. If the avails of lawless disregard of international law may be pursued in our courts, without compunction or restraint, our declared national policy of devotion to international law* might be

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* See, *e.g.*, letters of President Kennedy to the President of the Asian and Australasian Conference on World Peace Through Law, dated September 1, 1961, the President of the African and Middle Eastern Conference on World Peace Through Law, dated December 2, 1961, the President of the American Conference on World Peace Through Law, dated June 7, 1961, the President of the European Conference on World Peace Through Law, dated April 2, 1962, and the President of the First World Conference on World Peace Through Law, dated June 20, 1963. In his letter of December 2, 1961, the President stated, in part:

> "We have seen the successful operation of international law in established areas like the Law of the Sea. But the uncharted seas of arms control and the peaceful use of outer space demand the development of new rules of law. The tremendous strides in science and technology lend urgency to the need for these new rules and for legal institutions capable

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questioned. Such a result would appear most embarrassing to the future conduct of relations with such states and with Cuba and distinctly out of step with the policies of this Government.

Fourth, to say that diplomacy is the primary means for dealing with foreign acts of state should not lead to the complete elimination of the role to be played by domestic courts in providing remedies for violations of international law where parties are properly before the court. Moreover, particularly considering the nature of this country's relations with Cuba over the past three years, it is apparent that the diplomatic remedy is less than entirely adequate. Its ultimate sanction, the use of force, is prohibited by the United Nations charter while at the same time compulsory legal procedures are totally lacking. Indeed, municipal courts may provide the only effective remedy in this dilemma. See 1 OPPENHEIM, INTERNATIONAL LAW 267-70 (8th ed., H. Lauterpacht, 1955); The Association of the Bar of the City of New York, Committee on International Law, Report, *A Reconsideration of the Act of State Doctrine in United States Courts* (1959).

Judge Jessup has repeatedly called attention to the fact that until multipartite conventions provide an effective remedy, there is more need today than ever before "for the cooperation of national courts in contributing to the development of international law." Jessup, *Has the Supreme Court Abdicated One of its Functions?*, 40 AM. J.

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of harnessing the wonders we have created for the benefit—not the destruction—of mankind.

Supremacy of law within nations insures the freedom of man. Supremacy of law in the community of nations can free mankind from the dread of nuclear war. The rule of law must replace rule by force if we are to look forward to a stable world—a world which is hospitable to economic and social progress."

Copies of the above letters were furnished by Charles S. Rhyne, Esq., Chairman of the Special Committee on World Peace Through Law of the American Bar Association.

INT'L L. 168, 171-72 (1946); JESSUP, THE USE OF INTERNATIONAL LAW 141 (1959).

No decision establishes that proper judicial deference to the Executive requires the surrender of the judicial function in this case. The not unnatural preference of the Executive for exclusive jurisdiction should not be controlling.

The fifth consideration urged by the Government suggests that in the case of pending negotiations between this country and a foreign state, an adjudication of a particular claim might adversely affect and thus "embarrass" executive attempts to achieve an adjustment for a multiplicity of such claims.

This suggestion, upon reflection, must be regarded as largely fanciful. First, considering the actions taken by the Executive Department in recent months with respect to Cuba, running from official "protests" to "embargo," from "freezes" to active "encouragement" of counter-revolutionary forces, it is incredible that a judicial declaration of the unlawfulness of Cuba's confiscatory decrees in this case will "embarrass" anybody. Considering the loud public manner in which diplomacy is generally conducted today with nations most likely to disregard international law, the fear that a reasoned judicial decision upholding international law would add to the disharmony seems illusory indeed. Further, diplomatic roads to redress for those affected by the Cuban decrees have been closed for some time and no reason appears to expect their reopening within the foreseeable future. To request the courts to abstain indefinitely from exercising jurisdiction upon such a highly speculative consideration does not appear to be reasonable. Moreover, if a court might find a foreign act in violation of international law, it would

seem strained to assert that it should refrain from doing so merely in order that the Executive may be left free at some time in the indefinite future to barter acquiescence in such violation in exchange for the hope of widescale settlement of claims—with, perhaps, little benefit to the owners of each claim.*

Conversely, while perhaps a judicial determination that a particular act of a foreign state does not violate international law might in theory affect adversely future executive attempts to achieve a comprehensive settlement of claims, it is respectfully suggested that however desirable it may seem to keep the atmosphere clear for such negotiations, of far greater concern is the maintenance of minimum standards of conduct by nations. The increasing recognition of such standards by the bench, bar and public of civilized nations does not result primarily from executive dealings with "friendly" and "unfriendly" nations in the elaborate strategy of the "cold war" but from the gradual acceptance of the rule of law in international deal-

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* The Government points out, at page 33 of its brief, that because of the adoption of the Cuban Assets Control Regulations, a judgment for Petitioner would not result in turning over to the Castro regime the proceeds at issue, which would be added to the general fund of assets of Cuban nationals frozen pursuant to such regulations. The Government continues: "[e]ffective negotiations with Cuba to achieve some compensation for all American property which has been nationalized may well prove possible in the course of time." The significance of these comments is not entirely clear. If intended simply as a reassurance that a decision for Petitioner would not result in delivery of the funds to Cuba at this time, this is irrelevant to the determination of the rival claims of right. If, on the other hand, it is intended to suggest that assets which upon judicial scrutiny might be found to belong entirely to C.A.V. should instead be made available without scrutiny so as to provide a negotiating lever in seeking "some compensation for all [nationalized] American property," surely such a suggestion cannot be seriously entertained: it would amount to the sanctioning of a deprivation of property without due process. *Cf. Home Ins. Co.* v. *Dick*, 281 U.S. 397, 408 (1930).

ings and its gradual expansion by nations which believe in and uphold it.*

The analysis above demonstrates that the case at bar is actually one of first impression in this Court as it concerns the relationship between the "act of state" doctrine

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* The Court of Appeals regarded certain correspondence from representatives of the State Department, submitted to it prior to decision by *amicus curiae*, as inviting decision by the court and satisfying any requirement of waiver by the State Department (R. 170). The Government attacks the correspondence as not representing the official view of the State Department (Gov't Br. p. 42), and Petitioner attacks the Court of Appeals for denying it due process by considering the correspondence (Pet. Br. p. 52). Both positions seem to be rather exaggerated. The correspondence certainly went beyond mere amenities and, in view of the high positions occupied by the writers, might reasonably be regarded by a court as not reflecting any deep concern by the Department if the court were to agree with it that the actions of the Cuban Government violated international law. The court's consideration of the correspondence could hardly have violated any fundamental rights of the Petitioner, since it is hard to see how, if the Petitioner had had copies of the correspondence in advance, it could have persuaded the State Department either to recant its previous objection to the Cuban action as in violation of international law or, as the Department refused to do, to "comment on matters pending before the courts" (R. 170). Use by appellate courts of some matters *dehors* the record, even outside the usual fields of judicial notice, has apparently been considered consistent with due process and proper procedure, at least since the so-called "Brandeis" type of brief came into fashion.

However the correspondence may be viewed, it should not be dispositive, if we are correct in our argument that the judiciary is not required to abdicate in favor of the Executive where a violation of international law is shown. There was certainly no occasion for abdication here. *Cf. Menendez Rodrigues* v. *Pan American Life Ins. Co.*, *supra* at p. 437. Furthermore, the Executive had taken no action indicating that it desired the court to abdicate. Whether the correspondence is taken as official encouragement not to abdicate or whether it is disregarded and official silence is thought to be the posture of affairs, there was nothing to suggest that the Executive thought it should have a monopoly in passing on questions of violation of international law as a matter of urgent national necessity in this particular case. We have already argued that it should not have such a monopoly either under the Constitution or on any other basis—unless, perhaps, in some particular case, on grounds of urgent national necessity, established to the satisfaction of the courts, the Executive affirmatively asks the courts not to act. See The Association of The Bar of The City of New York, Committee on International Law, Report, *supra* at 11. It will be time enough to consider whether an exception should be made in such a case when it arises. No such situation is presented here.

and international law. Prior applications of the act of state doctrine in which plaintiff was a citizen of the acting state at the time of the crucial act, *e.g.*, *Oetjen* v. *Central Leather Co.*,* *Bernstein* v. *Van Heyghen Freres S.A.*, *supra*, are not in point because no question of international law could have been involved. *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918), a companion case to *Oetjen*, while it did involve an American citizen as plaintiff, is distinguishable in at least two critical respects. Unlike the case at bar, *Ricaud* involved a chain of third party purchasers whose title would have been disrupted by an adverse decision. Secondly, it appears that no violation of international law was in fact involved. Plaintiff argued that because the revolutionary general did not seize the supplies needed for his troops but rather bullion, the proceeds of which were used to purchase such supplies, a violation of the "laws of civilized warfare" occurred. See Brief of Appellee at pp. 10-11. In finding that the property "was seized for military purposes," 246 U.S. at 310, this Court appears to have rejected that somewhat tenuous distinction. To the extent that this Court considered any question of international law, therefore, it would appear the question was resolved against the claimant.

Finally, both Petitioner (Br. at 12, 57) and the Government (Br. at pp. 10, 20, 25, 28) rely heavily on the case of *Shapleigh* v. *Mier*, 299 U.S. 468 (1937). Reliance could not be more misplaced. Plaintiffs there in effect conceded that international law could not be the basis of their claim; and a convention between the United States and the acting state establishing an International Claims Commission removed any such question. *Id.* at 471. Moreover, this Court found

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* "Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court *such action* is not subject to reexamination and modification by the courts of this country." (Emphasis added) 246 U.S. at 303. It is in this context that one must read the otherwise gratuitous statement of the Court in that case that it was not necessary to consider the validity of the levy under applicable rules of international law.

that provision for adequate indemnity was in fact made in the decree in question. *Id.* at 473.

If these earlier decisions, which we have distinguished, are nevertheless viewed as decisions bearing on the issues involving the act of state doctrine in this case, it is respectfully urged that to that extent they be reconsidered and appropriately limited. Since the time of the decisions in *Ricaud* and *Oetjen* in 1918, applicable principles of international law have been significantly clarified and widely established. Those cases were decided before the impact of large-scale confiscations on international trade and investment became apparent. Revolutions were largely local. Relations between states were established chiefly by individual treaties and the elegant exchanges of traditional diplomacy. So-called international law consisted principally of certain minimal "Marquis of Queensbury rules" governing the conduct of states which, if not actually at war, were never far from belligerency. International law as a means of achieving harmony among nations was largely a dream of text-writers. The elaborate international organizations, the world-wide social and economic revolution, the entrance of new states and peoples upon the world scene—all lay ahead.*

These sweeping changes, it is respectfully suggested, have outmoded the concepts of total sovereignty upon which the earlier decisions ultimately rest.

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* See, *e.g.*, JESSUP, A MODERN LAW OF NATIONS, 157 *et seq.* (1952); BRIGGS, THE LAW OF NATIONS 957 (2d ed. 1953); Kunz, *Sanctions in International Law*, 54 AM. J. INT'L L. 324 (1960). The following are examples of the accelerating development of international institutions and agreements involving acceptance of restrictions on sovereignty with a view toward achievement of common goals.

(1) *World Organization*—United Nations. See United Nations Charter, Chapter I (Purposes and Principles), Chapter VI (Pacific Settlement of Disputes), Chapters IX and X (International Economic and Social Cooperation, the Economic and Social Council), Chapters III and XIV (International Court of Justice).

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(a) The Economic and Social Council has established various Commissions, such as the Social Commission, the Commission on Human Rights and the Commission on International Commodity Trade, to assist it in its functions. Also, a variety of standing committees, such as the Technical Assistance Committee, the Committee for Industrial Development and the Committee on Negotiations with Inter-Governmental Agencies, and several special bodies, such as the United Nations Children's Fund, function under its aegis. In addition, Regional Economic Commissions operate within this framework, *e.g.*, Europe (ECE), Asia and the Far East (ECFAE), Latin America (ECLA), and Africa (ECA).

(b) Much of the work of improving world economic and social conditions is carried out by so-called "Specialized Agencies," established by inter-governmental agreement and associated with the United Nations under Article 57 of its Charter, such as: International Atomic Energy Agency; International Labour Organization; Food and Agriculture Organization of the United Nations; United Nations Educational, Scientific and Cultural Organization; World Health Organization; International Monetary Fund; International Bank for Reconstruction and Development; International Development Association (Bank affiliate); International Finance Corporation (Bank affiliate); International Civil Aviation Organization; Universal Postal Union; International Telecommunication Union; World Meteorological Organization; Intergovernmental Maritime Consultative Organization and the General Agreement on Tariffs and Trade.

(c) Many *ad hoc* bodies, such as the International Law Commission, the Disarmament Commission and the Commission on Conciliation for the Congo, are appointed from time to time by the General Assembly.

(2) *International Communities*—

(a) European Community—(European Coal and Steel Community; European Economic Community; European Atomic Energy Community). These communities also have an Assembly and Court of Justice and other subsidiary organizations. See UNTS, Vol. 261, No. 3729, p. 140; UNTS, Vol. 298, No. 4300, p. 11; *ibid.*, No. 4302, p. 267; *ibid.*, No. 4301, p. 167. The Common Market was established under the European Economic Community Treaty, UNTS, Vol. 298, No. 4300. There is also the Council of Europe and the Organization for European Economic Cooperation.

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II

THE CUBAN ACTS VIOLATE GENERALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW.

A. The Confiscation of Foreign-Owned Property Here Violates the Basic Requirement of Compensation.

The rule that international law is violated if a state expropriates foreign-owned property without paying adequate compensation therefor has been variously stated as

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(b) Organization of American States, see UNTS, Vol. 119, p. 3. In addition, a Latin American Free Trade Area was provided for under the Treaty of Montevideo (1960), and a Central American Common Market was established in the Treaty of Economic Association (1960). As yet, these customs unions are not fully operative.

(3) *Other Inter-Governmental and Non-Governmental Bodies*—The multiplicity of inter-governmental and non-governmental institutions is limited only by the number of specialized problems encountered among nations. See listing of approximately 140 inter-governmental organizations and 1,500 non-governmental bodies in YEAR BOOK OF INTERNATIONAL ORGANIZATIONS (9th ed. 1962-63).

(4) *Treaties and Agreements*—A study by the Secretariat of the United Nations, *The Status of Permanent Sovereignty Over Natural Wealth and Resources*, U.N. Doc. No. A/AC.97/5 REV. 2 (1962) (hereinafter "U.N. Publication") contains a list of over 100 treaties of friendship and commerce and agreements relating to ownership and exploitation of natural resources. See U.N. Publication at 71-72, 228-30.

(5) *International Conferences and Conventions*—Government sponsored international conferences on a variety of topics, such as the 1958 Geneva Conference on the Law of the Sea, or those sponsored by private international associations or groups, such as the 1963 Athens Conference on World Peace Through Law, have been held with increasing frequency.

For an historical development of the changing international scene from the period following the First World War, see FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 17 *et seq.* (1953); WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 61 *et seq.* (1959).

a "core principle," Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, 1959 PROC. AM. SOC. INT'L L. 336, 337; as "firmly embedded," Anderson, *Basis of the Law Against Confiscating Foreign-Owned Property*, 21 AM. J. INT'L L. 525 (1927); and "firmly established," Re, *The Nationalization of Foreign-Owned Property*, 36 MINN. L. REV. 323, 329 (1952); and the "predominant view," Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125, 1127 (1948); which "continues to be . . . positive international law," Kunz, *The Mexican Expropriations*, 17 N.Y.U.L.Q. REV. 327, 341 (1940). See FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 211 (1953); 1 HYDE, INTERNATIONAL LAW 710-17 (2d ed. 1945); 1 SCHWARZENBERGER, INTERNATIONAL LAW 205 (2d ed. 1949); WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 33 (1959).*

A classic statement of the "justness" of the right to compensation was made by Secretary of State Hull in a note dated July 21, 1938 to the Mexican Ambassador in Washington:

> "The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. . . . We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law. Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law,

* See authorities collected in Appendix II hereto.

based as it is on reason, equity and justice." 3 Hackworth, DIGEST OF INTERNATIONAL LAW 656 (1942).*

Equally important, the rule has a sound and realistic basis in the economic necessities of international trade and foreign investment:

> "It must be noted that this accepted principle, which safeguards foreign-owned property from confiscation in time of peace, has become part of the law of nations not merely because it represents a universally recognized standard of justice, but also because it is absolutely essential to the welfare of every nation, for without its protection no commercial, or financial international intercourse could safely be carried on. . . . It derives its real authority and permanence from the universal need by all nations of foreign trade for their prosperity, and in the mutual benefits which nations receive through the investment of foreign capital for the development of national resources." Anderson, *supra* at 526.

The celebrated confiscation cases involving Russia, Mexico, Nazi Germany, the East European satellites, the Anglo-Iranian Oil Company, the Suez Canal, and Indonesia have often been cited by those who would seek to undercut the vitality of the right to compensation. In actuality, claims for compensation against virtually all the countries involved were successfully made; indeed, this is particularly apparent in regard to the Eastern European and Latin

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* "Every act of the Guatemalan Government constitutes a sovereign act, as do the acts of every other sovereign Government, including the acts of the Government of the United States. But to state that no sovereign act of a Government [a]ffecting foreign states or their nationals is open to discussion, or question, as to its validity under international law, because it is a sovereign act, is to say that states are not subject to international law. . . .

"The obligation of a state imposed by international law to pay just or fair compensation at the time of taking of property of foreigners cannot be abrogated from the international standpoint by local legislation." 29 Dep't State Bull. 358, 360 (1953).

American States, as the Government indicates in its brief at pages 30-32. Of significant interest is the fact that the practice of Socialist States themselves reflects their recognition of the duty to pay compensation for governmental takings.*

Expedient counter-arguments against compensation have been constructed on the following grounds: (1) the social and political significance of a given expropriation; (2) an "underdeveloped" country's inability to pay adequate compensation; and (3) the conveniently contrived principle of equality of treatment between an alien and a national of a particular state.

However, principles of international law have sufficient resiliency to withstand the expression of such dissident views. Failure of a particular country to recognize its international obligations, on grounds however speciously attractive, does not erode the general principle. As Wortley has observed in a more general context: "Failure by one state to recognize or to protect a claim to property is not necessarily fatal to it: other states may take different views and afford measures of protection under their systems of law, or by virtue of procedures of international law." Wortley, *Observations On the Public and Private International Law Relating to Expropriation*, 5 AM. J. COMP. L. 577, 593 (1956).

Even when the right to compensation is criticized, it is rarely suggested that the right is non-existent, but rather,

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* Drucker, *Compensation Treaties between Communist States*, 10 INT'L & COMP. L.Q. 238, 248-50 (1961) points out:

> "By recognising among themselves the principles of territoriality, and of the obligation to pay compensation for nationalisation, Communist States have come into line with the traditional rules of international law. . . . It has been shown that these doubts concerning the duty to pay compensation, which is alleged to arise from the practice of Socialist States—even if it is assumed that this practice has the effect Prof. Hans W. Baade [54 Am. J. Int'l L. 801 (1960)] appears to ascribe to it—are contradicted by the practice of Socialist States between themselves."

that it be confined to certain well-defined cases or else limited to partial payment. See Note, 62 COLUM. L. REV. 1278, 1300 (1962). A general and impersonal expropriation and redistribution of property, as distinguished from the taking of property from specifically designated persons, which is in accord with national planning policies and intended to achieve a measure of social welfare has been cited as an exception to the rule requiring compensation. This position was formally stated by the Mexican Minister of Foreign Affairs in his reply of August 3, 1938 to Secretary of State Hull:

> "My Government maintains . . . that there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land." 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 657 (1942).

In response, the United States reasserted the fundamental right to compensation. In his Note of August 22, 1938, Secretary of State Hull declared:

> "The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor." 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 658-59 (1942).

The continuing vitality of this principle is overwhelmingly corroborated by an impressive array of authoritative sources of international law in this country and abroad. The near-unanimity of foreign sources which recognize a fundamental right to compensation is thoroughly documented in

Appendix II hereto. In numerous treaties negotiated by the United States, there are unequivocal assurances of protection for foreign investment against discriminatory treatment and firm provisions for just compensation in case of expropriation. See Note, 62 COLUM. L. REV. 1278, 1300-01, n. 148 (1962); Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83 (1951). For example, in Art. VI, para. 3 of the treaty with Japan dated April 2, 1953, there is a provision that:

> "Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof." See Becker, *supra* at 342.

There are also a number of pertinent decisions by international tribunals, the leading case being the *Chorzow Factory* case, P.C.I.J., ser. A, No. 17 (1928). Although the actual holding in the case was that Polish seizures of German property were contrary to provisions of the Geneva Convention, the Court forcefully asserted that it was clear as a general principle that expropriation required payment of compensation. Id. at 46-47; see Re, *supra* at 326; 1 HYDE, *op. cit. supra* at 713-14.

In addition, as was briefly noted above, the customary acts of the various nations in the international community have been reflected in compensation agreements eventually negotiated in cases in which there was an original intention of outright confiscation. For example, the agreements reached by this country with Poland and Yugoslavia point up the fact that Communist Eastern bloc states have compensated foreigners even when their own nationals received little or no indemnity. See Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation. Critical Com-*

ments, 7 AM. J. COMP. L. 541, 547 (1958).* The universality of the principle of compensation is further shown by the presence of provisions similar to the Fifth and Fourteenth Amendments of the United States Constitution in the constitutions of such divergent countries as Afghanistan, Brazil, Burma, France, Japan, Lebanon and Yugoslavia. See generally, PEASLEE, CONSTITUTIONS OF NATIONS, Volumes I, II, and III (2d ed. 1956). In fact, the basic law of the Republic of Cuba at present contemplates some form of payment for property taken. Article 24 of The Fundamental Law of the Republic of Cuba of February 7, 1959, as amended July 5, 1960 now reads:

> "No other natural or juridical person ['other' meaning a named person such as a counter-revolutionary] can be deprived of his property except by competent authority and for a cause of public utility or social or national interest. The law shall regulate the procedure for expropriation and shall establish legislation and forms of payment and shall determine the competent authority to declare the case to be of public utility or social or national interest and that expropriation is necessary." (The July 5 Amendment changed "competent judicial authority" to "competent authority," and "for a justifiable cause" to "for a cause"; it added as a cause "national interest"; and it deleted "always after payment of appropriate compensation in cash, fixed by court action. Noncompliance . . . shall give the person whose property has been expropriated the right to protection by the courts and, if the case so warrants, to restitution of his property.") See CUBA AND THE RULE OF LAW, at p. 104, compiled by

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* See also Egypt's recognition of the duty to pay compensation in regard to the Suez Canal, Law of July 26, 1956; Declaration of April 24, 1957, 51 AM. J. INT'L L. 673, 675 (1957); Agreement of April 29, 1958, 54 AM. J. INT'L L. 493 (1960), and Iran's agreement to compensate, Nationalization Law of May 1, 1951, Arts. 2, 3; Agreement of September, 1954, see Farmanfarma, *The Oil Agreement Between Iran and the International Oil Consortium: the Law Controlling*, 34 TEXAS L. REV. 259, 261 (1955).

the International Commission of Jurists, Geneva (1962).

Most international law commentators uphold the principle of just compensation. Indeed, the two principal authorities which Petitioner cites in its brief at p. 46 for a contrary view do in fact recognize a requirement of compensation. Both Friedman and Baade distinguish between a general and an individual expropriation and affirm the need for compensation in the latter case. See FRIEDMAN, *op. cit. supra* at 206, 211; Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 AM. J. INT'L L. 801, 804 (1960).

Thus, a firmly established rule of international law exists that an expropriation be accompanied by payment of adequate compensation to the foreign property owner involved. This position is further supported by a resolution recently adopted by the General Assembly of the United Nations on December 14, 1962 by a vote of 87 to 2 with 12 abstentions.* Resolution 1803 (XVII) concerning permanent sovereignty over natural resources declares that:

"4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public

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* Failure to reach this degree of unanimity at the 1963 Conference on World Peace Through Law in Athens seemed due to a feeling on the part of some delegates that attempts were being made to push through resolutions on nationalization without sufficient consideration. Those who attended would undoubtedly corroborate that postponement for further study did not result from widespread differences on the propriety of compensation. See N.Y. Times, July 6, 1963, p. 3, col. 1.

Significantly, the Athens Conference adopted a "Declaration of General Principles" several of the provisions of which are pertinent here as reflecting the consensus for dedication to the continuing development of the rule of law among nations:

"1. All states and persons must accept the rule of law in the world community. In international matters, individuals, juridicial persons, states and international organizations must all be subject to international law, deriving rights and incurring obligations thereunder.

(Continued on Page 43)

utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case, where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."

Here there was a confiscation directed at specifically designated enterprises owned or controlled by United States nationals; accordingly, even if it were admitted *arguendo* that an exception may exist in the case of a "general and impersonal" nationalization, such an exception would be inapplicable to the case at bar. And even if only partial compensation was required, it is clear that in the present case there was no compensation whatever. The illusory character of the payment provisions was recognized in the courts below (R. 148-50, 176-77), and Petitioner has not seriously challenged this self-evident characterization. According to the Department of State press release No. 397, July 16, 1960, the provisions for compensation failed to meet "the most minimum criteria necessary to assure the payment of prompt, adequate and effective compensation" (R. 58).

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2. The rule of law in international affairs is based upon the principle of equality before the law. . . .

4. International law and legal institutions must be capable of expansion, development or change to meet the needs of a changing world composed of nations whose interdependence is ever on the increase and to permit progress in political, social and economic justice for all peoples. . . .

8. Those who are subject to international law must resolve their international disputes by adjudication, arbitration, or other peaceful procedures. . . ." 49 A.B.A.J. 858-59 (1963).

The opinion of the Court of Appeals in this case has been criticized in an editorial comment for casting "doubt on the established principle of international law that a taking of an alien's property without provision for adequate compensation is, in and of itself, a violation of international law, without regard to whether or not the taking is also discriminatory or retaliatory in nature." 57 Am. J. Int'l L. 97 (1963).

Actually, the Court of Appeals did recognize the fundamental character of the compensation requirement when it said: "If there had been adequate compensation for the seizure, regardless of the other circumstances surrounding the expropriations, it would be very difficult to find any violation of international law." (R. 176). The court did not make a definitive statement on the compensation point alone because it believed that resolution of this question was unnecessary to decision since lack of compensation was combined with the elements of discrimination and reprisal which together, in its view, constituted a violation of international law.

We submit that its affirmance of the District Court decision was correct without regard to the particular dimensions of the violations of international law which were presented.

B. An Act of Reprisal Which Singles Out Named Alien Properties for Confiscation is Clearly Violative of International Law

The principle of equality of treatment between nationals and aliens as to property has long been subscribed to—primarily, it may be noted, by the Latin American States. See, *e. g.*, Wortley, *op. cit. supra* at 120-21. Under Art. 25 of the Economic Agreement of Bogota, the principle was enunciated in the following terms:

> "[T]he States shall take no discriminatory action against investments by virtue of which foreign enterprises or capital may be deprived of legally acquired property rights, for reasons or under conditions different from those that the Constitution or laws of

each country provide for the expropriation of national property. Any expropriation shall be accompanied by payment of fair compensation in a prompt, adequate and effective manner." See *The Status of Permanent Sovereignty Over Natural Wealth and Resources*, a Study by the Secretariat, U.N. Doc. No. A/AC. 97/5/Rev. 2 at p. 75 (1962) (hereinafter "U.N. Publication").

The decisions of various international tribunals corroborate what is conceded to be the general rule—that discriminatory measures against particular aliens violate international law.* BRIERLY, THE LAW OF NATIONS 224 (5th ed. 1955); FRIEDMAN, *op. cit. supra* at 189-92; Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba* v. *Sabbatino*, 16 RUTGERS L. REV. 1, 38 (1961).** In the *Norwegian Shipowners* case, the Permanent Court of Arbitration found that the requisition of Norwegian ships by the United States violated international law, not only because of a lack of compensation, but also because of the "discriminatory use of the power of eminent domain." (U.S.A./Norway) 1 U.N. Rep. Int'l Arb. Awards 307, 336, 339 (1922). Although the factual situation in the *Oscar Chinn* case did not amount to discrimination, the Permanent Court of International Justice did say:

> "The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups." P.C.I.J., ser. A/B, No. 63, p. 87 (1934).

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* As Petitioner recognizes (Br. p. 41), reasonable conditions generally applied may be imposed for example on aliens' freedom to travel or to practice certain professions; but an act which affects only a particular group of aliens is clearly invalid. See 62 COLUM. L. REV. at 1301-02.

** Even in writings from Communist countries, such discriminatory measures of nationalization have been condemned as unlawful. See Domke, *Foreign Nationalizations*, 55 AM. J. INT'L L. 585, 603 (1961).

In a previous case, the *German Settlers* case, the Court had indicated that a taking under a law or decree which does not in terms discriminate does not preclude violation of a treaty obligation for equal treatment "in law and in fact." *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland,* P.C.I.J., ser. B, No. 6, pp. 23-24. And in one of the *Spanish Zone of Morocco* cases, there was also an international claim based on arbitrary and discriminatory State action. (Great Britain/Spain) 2 U.N. Rep. Int'l Arb. Awards 615, 647 (1925). In the *Standard Oil Company Tankers* case, the arbitral tribunal stressed the non-discriminatory application of the taking involved. Reparation Commission/U.S.A. (Claim of Standard Oil Company to Certain Tankers) 2 U.N. Rep. Int'l Arb. Awards 781, 794-95 (1926).

In the instant case, there was an invidious discrimination against a particular group of alien-controlled companies as well as an obvious inequality of treatment between Cuban-owned sugar companies and those owned by United States nationals. The Cuban acts in question were on their face in retaliation against the United States' reduction of the Cuban sugar quota and were specifically aimed at United States nationals.

What the twenty-six sugar, petroleum, electric, and telephone companies listed in Resolution No. 1 had in common was that all were owned or controlled by United States nationals. Cuban-owned and controlled private sugar enterprises were not expropriated until October 13, 1960 under a different law, Law No. 890 (R. 185). The Court of Appeals recognized that there was a significant difference between the treatment of America-owned sugar enterprises and those owned by Cubans, despite the relatively short lapse of time between expropriation decrees (R. 186). The sugar involved in the case at bar had already been shipped abroad and sold by October 13. As Law No. 851 and Resolution No. 1 clearly indicate, the difference in time between these acts and the taking under Law No. 890 resulted from the attempt by the Cuban govern-

ment to retaliate at a specific time against the United States. Later mistreatment of its own nationals surely cannot exculpate a foreign state of a violation of international law which was retaliatory and discriminatory against foreign nationals at the time it occurred.

A violation of international law is more clearly seen when there has been discrimination against named aliens founded on reprisal and combined with illusory compensation. The interrelationship of these offensive elements is reflected in the question for decision formulated by the Court of Appeals:

> "Is it a violation of international law for a country to fail to pay adequate compensation for the property it seizes from *a particular class of aliens, when the purpose for the seizure of the property is to retaliate against the homeland of those aliens and when the result of such seizure is to discriminate against them only.*" (R. 181) (Emphasis in original).

Precisely because they have not been treated fairly and equally, aliens may have superior rights under international law. As was pointed out by the United States-Mexican General Claims Commission:

> "it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. . . . There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens." *U.S.A. on behalf of George Hopkins, Claimant*, v. *The United Mexican States*, 4 U.N. Rep. Int'l Arb. Awards 41, 47; See U.N. Publication at p. 98.

Various State constitutions provide for expropriation only if motivated by some legitimate public or social purpose. Typically a constitution will refer to "reasons of public utility" or, as in many of the more recent constitutions, reasons of "social interest." See U.N. Publication at 47. National courts have refused to apply foreign expropriation decrees not grounded in a valid public purpose. In *Anglo-Iranian Oil Co.* v. *S.U.P.O.R. Co.*, Italy, Civil Court of Rome (1954), [1955] Int'l L. Rep. 23, 42, the Court said:

> "Italian courts must refuse to apply in Italy any foreign Law which decrees an expropriation, not for reasons of public interest but for purely political, persecutory, discriminatory, racial and confiscatory motives."

On the international level, the *Walter-Fletcher Smith Claim* was a case in which the absence of a public purpose for the expropriation involved was explicitly noted as at least one of the reasons for its illegality.

> "From a careful examination of the testimony and of the records, the Arbitrator is impressed that . . . . the expropriation proceedings were not, in good faith, for the purpose of public utility." (Cuba/U.S.A.) 2 U.N. Rep. Int'l Arb. Awards 913, 917 (1929).

Retaliation, except when justified by the need for individual self-defense or international self-preservation, no longer is a sanctioned rule of conduct among nations. Primitive notions of reprisal have been displaced by an expanding concept of the rule of law in the international community.*

Aside from the equitable principles which underlie these principles of just compensation, non-discriminatory treatment, and valid public purpose, there are vital economic considerations at stake which center on the need to

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* See note at p. 33 *supra*.

promote private international investment. Guaranties against taking, and related guaranties of compensation, have been embodied in a number of recent laws in various countries to encourage foreign investment. In the case of Bolivia, the Investment Promotion Law of December 16, 1960 provides that investments under the provisions of that law shall not be subject to expropriation; but if, exceptionally, expropriation should be necessary "for reasons of high national interest," it will take place only after payment of the property value in the currency in which the investment was made. U.N. Publication at page 55, based on information provided by the Bolivian Government in connection with the Secretariat's studies on promoting the international flow of private capital.

C. The Court of Appeals Properly Refused to Accept the Place of Incorporation as Determinative of the Nationality of C.A.V.

Petitioner asserts that the confiscation at bar presented no international law violation because C.A.V. was incorporated in Cuba and was therefore a Cuban national. (Br. at 27; see also R. 175). The Court of Appeals properly disposed of this formalistic argument by noting that over ninety percent of C.A.V.'s stockholders were United States nationals and that the express purpose of the Cuban acts was to apply a discriminatory and retaliatory economic sanction against nationals of the United States (R. 175).

Thus Cuba's action disregarded the corporate entity to strike at the stockholders, and Petitioner ought not now be allowed to disregard the nationality of those at whom the blow was aimed.

Nationality is ascribed to corporations for various purposes, primarily for the resolution of problems in municipal law, conflict of laws, and public international law. See van Hecke, *Nationality of Companies Analysed*, 8 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 223 (1961); 2

RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 18-24 (2d ed. 1960); Beckett, *Diplomatic Claims in Respect of Injuries to Companies*, 17 TRANS. GROT. SOC. 175 (1932).

> "It is by no means certain that the criterion must be the same in solving the three problems. Much of the existing confusion is due to the failure to recognize this." van Hecke, *supra* at 224. See also RABEL, *op. cit. supra* at 24.

Petitioner has failed to recognize these distinctions. Thus, cases such as *Louisville, C. & C. R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844), and *People of Puerto Rico* v. *Russell & Co.*, 288 U.S. 476 (1933), involving the issue of "citizenship" for purposes of Federal diversity jurisdiction, and *United States* v. *Northwestern Express Stage and Transportation Co.*, 164 U.S. 686 (1897), affirming that corporations are citizens for the purpose of qualifying to present claims for property destroyed by Indian depredations, are inapplicable to the case at bar. Nor is a case like *The Pedro*, 175 U.S. 354 (1899), which implicitly recognizes that in prize cases the flag determines a vessel's nationality, in point.

Another municipal law concept which Petitioner fails to distinguish relates to prohibitions against trading with the enemy in time of war (Pet. Br. at 28-29). In fact, most trading with the enemy cases involve special considerations not present in this case. Moreover, typical cases (not cited by Petitioner) such as *Daimler Co.* v. *Continental Tyre & Rubber Co.*, [1916] [2] A.C. 307, 340, have pierced the corporate veil and determined enemy character by application of a theory of control.*

Although the decisions of arbitral tribunals on corporate nationality have not been entirely uniform, see RABEL, *op. cit. supra* at 59; 1 SCHWARZENBERGER, INTERNATIONAL

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* The peace treaties after both World Wars adopted the control theory and the decisions of arbitral tribunals thereunder applied the test. See RABEL, *op. cit. supra* at 57-59. The control test also was applied by the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia*, P.C.I.J., ser. A, No. 7, 68-69 (1926).

LAW 175 (2d ed. 1949), Petitioner is in error when it states that *Charbonnage Frederic Henri S.A.* v. *Germany*, [1919-22] Ann. Dig. 227 "does not purport to set down a general rule of law." (Pet. Br. at p. 32) The Franco-German Mixed Arbitral Tribunal first determined that corporations, properly speaking, possess no nationality and concluded that nationality of the stockholders should be a function of control. The tribunal then went on to apply the Treaty of Versailles, pointing out that it

> "ought to regard as relevant the manner in which the exceptional war measures dealt with in Article 297(e) were applied to corporations during the war. It appeared, as a matter of fact, that they were applied having regard rather to the composition of the company than to its *siege social*. Thus the German Ordinance . . . laid down, in regard to the liquidation of British (and other) businesses, that those undertakings should be liquidated of which the greater part of the capital belonged to British nationals." *Id.* at 228. See, to the same effect, *Societe du Chemin de fer de Damas-Hamah* v. *Compagnie du Chemin de fer de Bagdad*, [1921-22] 1 M.A.T. 401.

Indeed, *Chamberlain & Hookham, Ltd.* v. *Solar Zahlerwerke* [1919-22] Ann. Dig. 344, which Petitioner cites in support of its argument at p. 33, was clearly based on an interpretation of Article 296 of the Treaty of Versailles.

The arbitral award Petitioner most relies on, the *Standard Oil Tankers* case (Pet. Br. at 32), has been dismissed as irrelevant:

> "The case of the *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* can be disregarded, as it is not properly an international responsibility case but rather a case concerned with the construction of a specific provision of the Versailles Treaty." van Hecke, *supra* at 236. See also FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 174-75 (1953).

Most of the writers who have considered the subject of corporate nationality in international law have been

concerned with the national character of a claim which a State is asked to espouse diplomatically. See Bagge, *Intervention on the Ground of Damage Caused to Nationals With Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders*, 34 BRIT. YB. INT'L L. 162, 164 (1958); Jones, *Claims on Behalf of Nationals Who are Shareholders in Foreign Companies*, 26 BRIT. YB. INT'L L. 225, 231 (1949); Beckett, *supra* at 175. See also BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 620-26 (1916); FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 171 (1953). Governments are naturally disinclined to protect companies which are not their "nationals." According to Borchard: "While American incorporation . . . affords a *prima facie* title to American protection, no hard and fast rules governing protection can be laid down." BORCHARD, *op. cit. supra* at 621. However, from analysis of international practice "one may conclude to the existence of an international rule allowing intervention on behalf of national shareholders of a company that is itself a national of the State oppressing it." van Hecke, *supra* at 237; see Jones, *supra* at 236.

Arbitrations in which the United States has interposed claims on behalf of American nationals as owners of foreign companies, see *Tlahualilo* [1913] For. Rel. U.S. 993; *El Triunfo* [1902] For. Rel. U.S. 859; *Delagoa Bay Railway Case* [1902] For. Rel. U.S. 848; *Romano-Americana* [1926] [II] For. Rel U.S. 308; *Alsop* [1910] For. Rel. U.S. 146 clearly evidence "the established practice of Governments to protect the interests of their nationals in foreign corporations in appropriate cases." 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 842 (1943). These cases arose in situations in which, as here, the corporation was exploited by the State to which it was entitled to look for protection, so that theoretically it could not assert any claim on a national or international level. It is in these cases that international law has provided relief from an otherwise unjust result. See Beckett, *supra* at 189; Jones, *supra* at 255; Bagge, *supra* at 162. Borchard, *Report to the Nineteenth Com-*

mittee of the Institute of International Law, 36 ANNUAIRE 297 (1931).*

In sum, there is no single nationality test which has been accepted for all purposes and thus no rule of positive international law compels application of the place of incorporation to determine corporate nationality.** International practice has reflected broad flexibility in discarding place of incorporation as determinative when it would cloak violations of international law or effect a result contrary to the principles of international conduct. The Court of Appeals properly recognized that international law has developed sufficiently to provide a remedy under the facts at bar, and that established criteria other than place of incorporation prevent the corporate fiction from obscuring a clear violation of international law or frustrating its remedy. *Cf.* 75 HARV. L. REV. 1607, 1621.

III

UNITED STATES COURTS MAY NOT BE USED TO ASSIST A FOREIGN GOVERNMENT IN CONSUMMATING AN ACT OF REPRISAL SPECIFICALLY DIRECTED AGAINST AMERICAN NATIONALS.

Even if the Court were to reject our earlier arguments in the belief that: (1) rigid application of the act of state doctrine precludes judicial inquiry, or (2) no question of international law is involved, or (3) the Cuban acts do not

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* FRIEDMAN, *op. cit. supra* at 171, states:

"International law only takes account of the real nationality of the physical persons covered by the legal fiction of corporate personality, since such physical persons alone possess any importance as nationals of a State. As Professor Borchard rightly points out: 'the company is simply a form of organisation, a veritable cloak, which allows individuals to enjoy their property, and an injury inflicted upon this form as such is a pure fiction. It is the individuals who derive an advantage from the organisation constituted in the form of a company and who are injured. . . .' In other words, international law deliberately sacrifices the unitary conception of legal personality which regards corporations as having a single nationality in order to look beyond the legal forms and to determine the interests and the parties actually suffering injury." (Footnotes omitted)

** SCHWARZENBERGER, *op. cit. supra* at 175-76, states:

"There is not one single test which has been accepted by State practice for all purposes."

violate international law, the judgment below should nevertheless be sustained on the ground that the public policy of the forum bars enforcement of such acts.

The thesis of Petitioner is an audacious one: that United States courts should execute a confiscatory decree of Cuba, the sole purpose of which is to deal a blow against the United States and its nationals. Such a proposition is offensive not only to the public policy of New York but also to that of the nation. Since this is a diversity case (R. 159-60), New York law is applicable, *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938); and under the principles of *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), and *Griffin* v. *McCoach*, 313 U.S. 498 (1941), the New York conflict of laws rules, including the public policy of New York, govern. It is the law of New York that its courts will not give extraterritorial effect to confiscatory decrees.

> "Laws of foreign governments have extraterritorial jurisdiction only by comity. . . . The principle which determines whether we shall give effect to foreign legislation is that of public policy. . . . Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail. . . . That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. . . . We enforce the same principle even in regard to statutes of sister States." (Citations omitted).* *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N.Y.

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* *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N.Y. 369, 379, 189 N.E. 456, 460 (1934) distinguishes the opinion in *M. Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 678 (1933), cited by both Petitioner and the Government, pointing out that the "general statement" contained therein to the effect that recognition retroactively validates all of the acts of the particular government "must be read in connection with its context and as so read it did not refer to acts sought to be given effect extraterritorially." *Id.* at 379. The "general statement" in the *Salimoff* case, quoted on page 12 of Petitioner's brief:

> "'The courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries'"

was pure dictum—the owners of the property there involved, which had been seized by the Russian government, were Russian nationals.

369, 378-79, 189 N.E. 456, 460 (1934).

See *Bollack* v. *Societe Generale*, 263 App. Div. 601, 33 N.Y.S.2d 986 (1942); *Schwartz* v. *Compania Azucarera Vertientes-Camagucy de Cuba*, 28 Misc. 2d 355, 208 N.Y.S.2d 833 (Sup. Ct. 1960); *A/S Merilaid & Co.* v. *Chase Nat'l Bank*, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947); *Russian Reinsurance Co.* v. *Stoddard*, 240 N.Y. 149, 147 N.E. 703 (1925) (dictum); *Mann* v. *Compania Petrolera Trans-Cuba, S.A.*, 17 App. Div. 2d 193, 202, 234 N.Y.S.2d 1001, 1009-10 (1962) (dissenting opinion); *cf. Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.*, 280 N.Y. 286, 20 N.E.2d 758 (1939), *aff'd by equally divided court*, 309 U.S. 624 (1940) (*per curiam*). See also *Anderson* v. *N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942); *Plesch* v. *Banque Nationale de la Republique d'Haiti*, 273 App. Div. 224, 77 N.Y.S.2d 43, *aff'd*, 298 N.Y. 573, 81 N.E.2d 106 (1948) (per curiam).

The cited cases involved property located in New York at the time of the purported taking. Whether or not the property interest seized in the instant case is regarded as having had a New York situs when the decree was promulgated, it is submitted that the principle of these cases is here properly invoked. As noted above, Cuba seeks to extend its sovereign arm into a rival domain to extract payment in New York of a commercial obligation from a New York debtor.* The proclamation was but the first step in the taking; under the circumstances of this case, where the property seized was already impressed with a contract of sale to be performed in New York, it remained necessary for Cuba, in the language of Resolution No. 1, to be "subrogated in the place and stead" of C.A.V.'s contractual rights against Farr (R. 105)—rights which matured upon presentation in New York of the requisite documents (R. 75).** Petitioner has therefore erroneously argued that the taking was completed within the territory of Cuba. In order to

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* See the discussion at pp. 20-21, *supra*.

** The fact that Farr subsequently entered into a new contract is beside the point. However "fortuitously", the proceeds of sale are

(Continued on next page)

reduce its claim to possession Petitioner required and still requires the extraterritorial assistance of the United States courts. This assistance, according to New York public policy, it may not have.

The Cuban acts are offensive also to the public policy of the nation. The fundamental law of the land as expressed in the Fifth Amendment upholds the right within the United States to adequate compensation for a governmental taking. In connection with the Cuban decree, the State Department, speaking for the Executive, has protested that it was "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in essence discriminatory, arbitrary and confiscatory." (R.57).* Congress has also repeatedly expressed the national public policy with which the Cuban acts collide.**

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here in New York, and C.A.V.'s right thereto is independent of any action by Farr. In fact, however, the record could not be clearer that Farr in this case did not "freely" contract with C.A.V.'s financial agent, but was compelled to do so in order to clear the ship for departure from the Cuban area and thus meet its commitments for resale of the cargo to its customer in Morocco (R. 75, 133). When Farr was confronted with the rival claims of C.A.V. and Petitioner to the proceeds in New York, it acted as any "stakeholder" would (as well as pursuant to court order) in refusing to turn them over pending clarification by the courts (R. 26, 49-50). Cuba then invoked the process of the court to effectuate its taking.

* At least one decision of this Court also appears to support the proposition that foreign acts repugnant to national "public policy" will not be given effect. In *Oscanyan* v. *Arms Co.*, 103 U.S. 261 (1880) this court refused to give effect to a Turkish law according to which the plaintiff, a Turkish consular official, was allegedly allowed to enter into an agreement with a private company to obtain a commission for the sale of arms. This Court found such action to be "so repugnant to all our notions of right and morality, that it can have no countenance in the courts of the United States." *Id.* at 278.

** "In any case in which the President determines that a nation . . . [has] nationalized, expropriated, or otherwise seized the ownership or control of the property of United States citizens . . . and has failed within six months following the taking of action . . . to discharge its obligations under international law toward such citizens,

(Continued on next page)

It is interesting to note that Petitioner in its brief at pages 13 and 15 cites the opinion of the Florida District Court of Appeals for the Third Circuit in *National Institute of Agrarian Reform* v. *Kane*, 153 So. 2d 40 (1963), *reversing* 11 Fla. Supp. 116 (Cir. Ct. 1961), in support of the proposition that state courts apply the act of state doctrine in cases arising out of Cuban nationalization of property owned by United States nationals. Actually, the Florida appellate court found the Court of Appeals' opinion in the case at bar to be "persuasive, but not determinative as applied to the facts" of the case before it. The Florida court went on to state:

> "There is a recognizable distinction between the refusal to enforce a foreign law which is repugnant to the public policy of the forum [See Loucks v. Standard Oil Co. of N.Y., 224 N.Y. 99, 120 N.E. 198 (1918)] and refusing to pass on the validity under the law of a foreign state of the acts of its officials [See Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F. 2d 246 (2nd Cir. 1947), cert. denied, 332 U.S. 772, 68 S. Ct. 88, 92 L.Ed. 357 (1947); Pons v. Republic of Cuba, 111 U.S. App. D.C. 141, 294 F.2d 925 (D.C. Cir. 1961),

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including the prompt payment to the owner or owners of such property so nationalized, expropriated, or otherwise seized, . . . the President shall suspend any quota . . . to purchase and import sugar under this chapter of such nation until he is satisfied that appropriate steps are being taken." 7 U.S.C. § 1158(c) as amended July 13, 1962, 76 Stat. 166.

Also, Section 620(e) of the Foreign Assistance Act of 1961, as amended by Section 301 of the Foreign Assistance Act of 1962, provides:

> "The President shall suspend assistance to the government of any country . . . when the government of such country . . . has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or . . . corporation . . . and . . . fails within a reasonable time . . . to take appropriate steps, . . . to discharge its obligations under international law toward such citizen or entity, including equitable and speedy compensation for such property in convertible foreign exchange, as required by international law . . . ." 22 U.S.C. § 2370(e), as amended 76 Stat. 260.

cert. denied, 368 U.S. 960, 82 S. Ct. 406, 7 L.Ed. 2d 392 (1962). By analogy, we cannot declare the invalidity of a Cuban decree as a basis for creating a right of recovery in the plaintiff in this cause." 153 So. 2d at 43-44.

The court recognized that "in the Sabbatino case, the action was by a Cuban bank, an arm of the Cuban government, invoking the aid of a court of the United States to act affirmatively to enforce a foreign decree which was patently obnoxious to the public policy of the forum." *Id.* at 43. Clearly, therefore, while Petitioner is correct that the Florida court reversed a trial court decision upon which the Court of Appeals in the instant case had relied, it should also have been pointed out that the reversal was predicated upon other grounds and that such grounds for distinguishing this case from the *Kane* case are precisely those now urged by C.A.V.*

Summarizing, this is not a case in which a completed foreign act is sought to be undone; on the contrary, the sovereign is seeking to reduce to possession the fruits of its confiscatory decree outside the territory over which it is sovereign. This alone, it is believed, should suffice to demonstrate that United States courts should not permit their process thus to be used. But here the precise intent and effect is to use United States courts to punish United States nationals for acts of the United States. Under such circumstances, even the most expansive concept of comity must surely rupture.

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* Along with the *Kane* case, Petitioner at p. 13 of its brief also cites *Theye Y Ajuria* v. *Pan American Life Ins. Co.*, 154 So. 2d 450 (La. Ct. App. 1963), as a case applying the act of state doctrine to a Cuban nationalization of property owned by United States nationals. In fact, however, the court in *Theye* viewed the fact that the Cuban act there in question affected plaintiff, a *Cuban* national, as dispositive when it said:

> "It is a well established principle of law, recognized by all appellate court decisions, that a recognized Sovereign Nation can make laws binding upon its nationals within its bounds." *Id.* at 452.

IV

SHOULD THIS COURT DECIDE FOR PETITIONER ON THE ISSUES ABOVE, THE CASE SHOULD BE REVERSED AND REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

A. C.A.V. has a Valid Counterclaim Against Petitioner.*

Assuming this Court rejects the arguments above, the case should be reversed and remanded to the District Court with leave to C.A.V. to appear as a party defendant and file an answer to petitioner's amended complaint. C.A.V. could then counterclaim against petitioner for the full value of its confiscated assets or interpose a setoff in the amount of any judgment against it. See 75 HARV. L. REV. at 1617 (1962); Baade, *supra* at 804. The propriety of asserting a counterclaim or setoff against this very agent of the Cuban Government has already been upheld in this case. *Banco Nacional de Cuba* v. *Sabbatino*, 27 F.R.D. 255 (S.D.N.Y. 1961); see *National City Bank* v. *Republic of China, supra; United States* v. *National City Bank*, 83 Fed. 236, 238 (2d Cir.), *cert. denied* 299 U.S. 563 (1936).

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* Petitioner's contention in Point VI of its brief (that even if the taking violated international law C.A.V.'s only remedy is for damages in an international forum) would seem to be irrelevant here. This Court need not determine the proper form of action for C.A.V. if it brought an action or the validity of a setoff or counterclaim if this case were reversed and remanded.

This is a case in which Petitioner, not C.A.V., is seeking a remedy; the proceeds are not in Petitioner's hands and hence "restitution" is not involved. But in any event, it is clear that under international law restitution is a proper remedy for an illegal taking. See, *e.g.*, *Chorzow Factory, supra* at 4, 47-48 (dictum); *Portuguese Religious Properties Case* (France, Great Britain and Spain v. Portugal), 1 U.N. Rep. Int'l Arb. Awards 7 (Perm. Ct. Arb. 1920), SCOTT, HAGUE COURT REPORTS 1, 5 (1932); 2 WHITEMAN, DAMAGES IN INTERNATIONAL LAW 857 (1937). Finally, in this case, involving solely the proceeds of sale of the sugar, "damages" and "restitution" appear to be identical.

However, if this Court should reject all of our previous contentions and remand the case to the District Court, that Court would then have to deal with our final contention, that C.A.V. should be afforded the opportunity to protect its position by all proper means, including the interposition of a counterclaim for damages resulting from the confiscation of its assets. The propriety of such a claim, whether considered to be for damages or "restitution", would appear to be for that Court to determine.

B. There are Triable Issues of Fact.

Again, assuming the judgment of the court below is to be reversed, the case should be remanded for further proceedings in the District Court since genuine issues of material fact would then be present. See FED. R. CIV. P. 56(e).

It has never been shown at exactly what distance from port the S.S. Hornfels was loaded between August 6th and 9th, although presumably it was more than three miles (R. 89). In addition, no evidence has been adduced with respect to proper construction of the said Cuban acts, actual publication of a "Spetial Issue" of the Official Gazette on August 6, 1960 (See R. 74), or the content of Cuban Law concerning passage of title in an f.a.s. sales transaction. Other issues might emerge for trial.

Conclusion

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

In the alternative, the case should be remanded to the District Court for further proceedings with leave to C.A.V. to intervene as a party defendant and to interpose a setoff or a counterclaim and proceed to trial on the issues of fact.

Respectfully submitted,

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September 30, 1963.

APPENDIX I

The "act of state" doctrine contended for by the Petitioner and the Government does not appear to exist in most countries. It is limited to a few nations and depends, in them, on the broad language of certain Anglo-American decisions relied on by Petitioner and the Government and distinguished in this brief and Appendix. Elsewhere throughout the world, as the following cases demonstrate, courts are free to examine the act of a foreign state to determine whether to recognize and apply it or to reject it either because the act violates international law or because it is repugnant to the public policy (public order) of the forum.*

Aden

Anglo-Iranian Oil Co. v. *Jaffrate (The Rose Mary)*, Supreme Court of Aden (1953), [1953] Int'l L. Rep. 316, [1953] I Weekly L.R. 246, 47 Am. J. Int'l L. 325 (reviewing Iranian nationalization of the British oil company and holding that the company was entitled to the oil which had remained its property and to which the Government of Iran had acquired no title because the nationalization, being without compensation, violated international law). The court distinguished the case from *Luther* v. *Sagor* (1921) 3 K.B. 532, 37 T.L.R. 777 and *Olga* v. *Weisz* (1929) 1 K.B. 718, 45 T.L.R. 365 on the ground that here the property taken was of a British corporation whereas in the other cases it was the property of a national of the confiscating state. The court said:

> "For the reasons set out above I am satisfied that following international law as incorporated in the domestic law of Aden, this Court must refuse validity to the Persian Oil Nationalisation Law in so far as it

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* *Cf.* the authorities collected in n.16 at p. 21 of the Government's *amicus* brief in which the Government lists numerous cases in support of the proposition that "other countries also [recognize] the act of state principle" and then concludes by conceding that civil law countries "reserve the right to refuse to give effect to acts repugnant to the policy of the forum."

relates to nationalised property of the plaintiffs which may come within its territorial jurisdiction. I find the oil in dispute to be still the property of the plaintiffs. . . .

I therefore find that the plaintiffs are entitled to succeed in this action and that the cargo of oil must be returned to them."

France

French courts consistently review foreign expropriations within the context of the public policy of the forum (*ordre public*). More frequently than the courts of other continental countries, the French courts have held that a foreign taking of property, even in a case in which nationals of the taking country are involved, unaccompanied by just compensation violates the public order of France, and title purportedly transferred pursuant to a foreign decree is not recognized.

Ropit case, Cour de Cassation (Supreme Court) (1928), [1929] Recueil general des lois et des arrets (Sirey) (hereinafter Sirey) Part 1, 217, 55 Journal du droit international (Clunet) (hereinafter Clunet) 674 (1928), [1927-1928] Ann. Dig. No. 43 (Claim of the Soviet Russian Government to part of a nationalized merchant fleet which had escaped from Russia after the nationalization. The Supreme Court refused to apply the Soviet law because a confiscation without compensation was contrary to "one of the fundamental principles of our social institutions".)

Volatron v. *Moulis*, Cour d'appel (Court of Appeals) of Aix (1939), [1939] Recueil Dalloz, Recueil hebdomadaire de jurisprudence etc. (hereinafter Recueil Dalloz) 329, [1938-40] Ann. Dig. No. 10. (Former owner's claims to proceeds of a potash shipment from the Spanish mines of a company whose assets were confiscated without compensation. The court held that the expropriation cannot be recognized:

> "[It is] contrary to French public order and cannot be applied . . .")

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Societe Potassas Ibericas v. *Nathan Bloch*, Supreme Court (1939), [1939] Recueil Dalloz 257, 66 Clunet 615 (1939), [1938-1940] Ann. Dig. No. 54. (The court, in a case with substantially the same facts as in *Volatron* v. *Moulin*, came to the same result: "French courts may not recognize any divestment of a right of ownership, except with consent of the owner, without just and previous indemnity.")

Cf. Lafuente v. *Llaguno y Duranona*, Court of Appeals of Bordeaux (1938), [1938] Recueil general periodique et critique des decisions, conventions et lois relatives au droit international public et prive (La Pradelle) (hereinafter La Pradelle) Part III, 66, [1938-1940] Ann. Dig. No. 55; *Larrasquitu and the Spanish State* v. *Societe Cementos Resola*, Court of Appeals of Poitiers (1937), 65 Clunet 288 (1938), 1938 La Pradelle part III, 68, [1935-1937] Ann. Dig. No. 71. (The courts inquired into Spanish requisitions of ships in the light of French public order but found that the requisition in question did not violate French public order because similar requisitions were possible under French law, the property remained in the owner and the laws provided for compensation.)

Germany

In *M.* v. *Aktieselskabet K.H.*, 145 Entscheidungen des Reichsgerichts in Zivilsachen 16 (1934), [1933-1934] Ann. Dig. No. 217, the Reichsgericht (former Supreme Court in Germany) refused to apply a French law, otherwise applicable according to German conflict rules, because it violated international law since it was confiscatory.

The *Czechoslovakian expropriations of Sudeten-Germans* cases uniformly held that discriminatory expropriation without compensation violated international law and was contrary to the public order of the forum. For comprehensive text authority concerning these expropriations and the disposition of cases by the German courts with respect to property so taken see Graue, "Germany: Recognition of Foreign Expropriations" 3 Am. J. Comp. L. 93 (1954); Beitzke, 15 Zeitschrift fuer auslaendisches und internationales Privatrecht (Rabel) 145 (1949-1950).

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District Courts:

Amtsgericht Waiblingen (1948), [1949] Monatsschrift fuer Deutsches Recht (hereinafter M.D.R.) 163, [1945-1949] Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechtes, Sonderveroeffentlichung der Zeitschrift fuer auslaendisches und internationales Privatrecht (Rabel) (hereinafter I.P. Rspr.) No. 3;

Amtsgericht Dingolfing (1948), [1945-1949] I.P. Rspr. No. 4, [1948] Ann. Dig. No. 12;

Amtsgericht Berchtesgarden (1951), [1952-1953] I.P. Rspr. No. 6;

Appellate Courts:

Landgericht Kassel (1948), [1948] Neue Juristische Wochenschrift (hereinafter N.J.W.) 628, [1945-1949] I.P. Rspr. No. 2;

Oberlandesgericht Muenchen (1951), [1952] M.D.R. 425, [1950-1951] I.P. Rspr. No. 5, remanded by Bundesgerichtshof (Supreme Court in Civil Matters) (1953), 8 Entscheidungen des Bundesgerichtshofes in Zivilsachen 378, [1953] Int'l L. Rep. 31 because after the decision of the Oberlandesgericht had been rendered HICOM Law No. 63 exempted those cases from the jurisdiction of German courts;

Oberlandesgericht Nuernberg (1951), [1952] N.J.W. 109, [1950-1951] I.P. Rspr. No. 13 (at p. 25).

Oberlandesgericht Hamburg (1953), [1952-1953] I.P. Rspr. No. 36 at p. 118, *aff'd*, Bundesgerichtshof (1955), [1955] M.D.R. 351.

The cases after World War I holding that the Russian nationals had validly transferred title were based on a recognition of these expropriations by Germany in international agreements. See Amtsgericht Berlin-Schoeneberg (1928), [1928] I.P. Rspr. No. 16; Caucasian Licorice Company v. Katz, Landgericht Hamburg (1924), [1924] Hanseatische Rechts-Zeitschrift 750.

Appendix I, p. 5

Greece

Greek law applies foreign law under the reserve of "public order".

District Court of Piraeus (1937), [1937] Efimeris Ellinon Nomicon D, 560, reported by Massouridis, "The Effects of Confiscation, Expropriation, and Requisition by a Foreign Authority," 3 Revue Hellenique de droit international 62, 68 (1950) (Denial to recognize an expropriation of a ship seized by the Spanish Government on the ground that the confiscation was incompatible with the public order).

Italy

Anglo-Iranian Oil Co. v. *S.U.P.O.R. Co.*, Civil Tribunal of Venice (1953), [1955] Int'l L. Rep. 19, 47 Am. J. Int'l L. 509 (1953), 76 Il Foro Italiano Part I, 719 (1953) (reviewing Iranian nationalization of the oil company but holding that it did not violate Italian public order because of provision for compensation:

> "Among the principles included under the generic name of 'public order' is doubtless the one that no person should be deprived of his property without payment of compensation . . ."

Anglo-Iranian Oil Co. v. *S.U.P.O.R. Co.*, Civil Tribunal of Rome (1954), [1955] Int'l L. Rep. 23, 49 Am. J. Int'l L. 259 (1955), 78 Il Foro Italiano Part I, 255 (1955) (reviewing the above nationalization the court said:

> "As has been stated above, however, this court holds that the Italian courts have the right and the duty to examine a foreign law, from the point of view of its legality, so as to establish whether it is contrary to . . . international public policy or to any generally accepted principles of international law . . . In consequence, the Italian courts must refuse to apply in Italy any foreign law which decrees an expropriation, not for reasons of public interest but for purely political, persecutory, discriminatory, racial and confiscatory

motives. Furthermore, the Italian courts must refuse to apply in Italy such foreign laws as may, even for non-political and non-persecutory motives, decree expropriation of the property of any foreign national without compensation."

The court found that the Iranian law did not violate these principles.)

Japan

Anglo-Iranian Oil Co. v. *Idemitsu Kosan Kabushiki Kaisha*, High Court of Tokyo (1953), [1953] Int'l L. Rep. 305, 312. (Reviewed the Iranian oil nationalization under international law and public policy but found no violation of public policy.)

The Netherlands

The Dutch courts will apply foreign laws unless the foreign law or act of state violates the Dutch public order.

Davis & Cy. v. *Compania Mexicana de Petroleo El Aguila*, Arr.-Rechtbank (District Court) of Rotterdam (1939), [1939] Nederlandsche Jurisprudentie (hereinafter N. J.) No. 747, [1919-1942] Ann. Dig. (Supp.) No. 7 (note), [1938-1940] Ann. Dig. No. 12. (The court considered the validity of the Mexican oil expropriations under international law, but found no violation because of provision for compensation.)

Petroservice S.A. v. *El Aguila*, District Court of Arnhem (1939), [1940] N. J. No. 19, [1919-1942] Ann. Dig. (Supp. vol.) No. 7 (note), *aff'd* Gerechthof (Court of Appeals) of Arnhem (1939), [1940] N. J. No. 20. (The District Court questioned the compatability of a Mexican oil expropriation with international law and, interpreting the promise to pay compensation differently from the District Court of Rotterdam in *Davis* v. *El Aguila*, *supra*, it came to the conclusion that the Mexican acts should not be given effect.)

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United States of Mexico v. *N.V. De Bataafsche Petroleum Maatschappij*, District Court of Middelburg (1938), [1938] N. J. No. 790, [1919-1942] Ann. Dig. (Supp. vol.) No. 7. (The court did not find an infringement on Dutch public order in the Mexican expropriation. The sentence quoted in the *amicus* brief of the Government in n. 16 at p. 21 actually refers to the question of whether the Dutch court has the power to examine the Mexican Decree under Mexican law and not under international law.)

Bank Indonesia v. *Senembah Maatschappij N.V. and De Twentsche Bank N.V.*, Court of Appeals of Amsterdam (1959), [1959] N. J. No. 350, 7 Nederlands Tijdschrift voor Internationaal Recht 400 (1960), reported by Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L LAW 305 (1960) (Reviewing the Indonesian nationalization measures, the court found that the Indonesian action was discriminatory, without compensation, and therefore in violation of international law.

> "[The] Indonesian administration constitutes a manifest as well as serious violation of international law and is therefore illegal and without legal consequence;
>
> Irrespective of international law, the administration cannot be recognized in the Netherlands, because it is in contradiction to Dutch public policy . . ."

With regard to the act of state doctrine the Amsterdam Appellate Court observed:

> "One cannot speak of a universally accepted rule of international law; the judge generally refrained and should refrain from determining the legal validity of acts jure imperii of a foreign sovereign. An exception, however, must be made if the respective sovereign

acts are to be considered a flagrant contradiction to international law.")*

P. T. Escomptebank v. *N.V. Assurantie Maatschappij de Nederlanden van 1845* (Court of Appeal of The Hague, June 6, 1963). (Attempt by companies expropriated in Indonesia to recover claims outside the legal sphere of Indonesia.

The court said:

"And whereas, with respect hereto, while respecting the rule that in general a Netherlands court may not pass judgment on the lawfulness of acts performed jure imperii by a foreign power, in a law suit between private companies that same court is bound to take no account of such acts of State and to regard them as non-existent if they are at variance with (unwritten) rules of international law for the protection of private interests;

And whereas the placing under control followed by confiscation of the Indonesian subsidiaries of the respondents without any compensation, a measure taken solely against enterprises in Indonesia owned by Netherlands nationals or Netherlands legal persons, constitutes a serious breach of the said rules of international law and as such accordingly cannot be recognized by the Netherlands courts and the measures taken in that behalf must therefore be regarded as non-existent;")

* Petitioner's brief distinguishes the case because the tobacco in question was in Holland at the time of the nationalization. It is true that plaintiff sought to obtain an order to the effect that warehouse warrants representing tobacco located in Holland should be handed over. But the claim was based on the theory that tobacco located in Indonesia and seized there had been sold by the Indonesian administration. Since the nationalization was not recognized, the sale freed petitioner of a debt for which both quantities of tobacco were under lien, and he was therefore entitled to claim the warrants. Thus the court had to address itself to the question of the validity of the confiscation of the tobacco located in Indonesia.

Appendix I, p. 9

Switzerland

Swiss law does not recognize an act of state doctrine. Courts have discretion under the doctrine of "public order" to apply or reject a foreign act of state. For comprehensive text authority, see Niederer, Einige Grenzfragen des Ordre Public in Faellen entschaedigungsloser Konfiskation, 11 Schweizerisches Jahrbuch fuer internationales Recht—Annuaire suisse de droit international (hereinafter Schw. J.B.) 91 (1954).

Nathan-Institut A.G. v. *Schweizerische Bank fuer Kapitalanlagen*, Bundesgericht (Federal Supreme Court) (1934), 60 Entscheidungen des Schweizerischen Bundesgerichtes—Arrets du Tribunal Federal Suisse, Part II (hereinafter B.G.E. II) 294, 311; *Rheinische Grundstuecks—Handelsgesellschaft m.b.H.* v. *A.G. fuer Immobilienwerte* (1935), 61 B.G.E. II 242; *Hunziker* v. *Haug* (1937), 63 B.G.E. II 42. (These cases denied the applicability of Nazi "Foreign Exchange Legislation" in so far as it diminished the rights of the creditors.)

Boehmische Unionbank v. *Heynau* (1942), 68 B.G.E. II 377; also Zuercher Obergericht, 39 Blaetter fuer Zuercher Rechtsprechung No. 95 (1940). (The court considered sequestration of enterprises by the Nazi government as confiscation without compensation and violative of Swiss public order; accordingly, it considered the former owner as the creditor in asserting claims of the company.)

Zuercher Obergericht, 40 Blaetter fuer Zuercher Rechtsprechung 172-173 (1941) held:

> "In this respect [i.e., if a foreign law violates Swiss public order] it can make no difference, who will be favored or hurt by the disregard of the foreign law . . . If one would make the application of the public order dependent on the question of whose interests are involved, one has to conclude that a foreign law violates the public order only if the application of the foreign law is of disadvantage to the Swiss creditor, but that it is reconcilable with the public order, if it is of disad-

vantage : . . to an alien. This unequal treatment of nationals and aliens . . . would also violate the Swiss sense of justice [i.e., the public order]."

Bezirksgericht Zuerich [1949] Schweizer Juristenzeitung 342, 7 Schw. J.B. 165, 167 (1950) held: "It appears above all as evident that . . . a confiscation without compensation is in contradiction to the principles of Swiss law."

Rosenberg v. *Fischer,* Supreme Court, 6 Schw. J.B. 139 (1949), [1948] Ann. Dig. No. 150 (Claim for the restitution of works of art which had been seized by the German authorities of occupation in France. The claim was brought in reliance on a Swiss law, but the court said that this law changed only slightly the general Swiss law). The court held:

> "In fact, an object seized from its owner in a manner contrary to international law has, without doubt, the character of stolen or lost property in the meaning of Article 934, par. 1, of the Civil Code . . ."

APPENDIX II

EXPROPRIATION WITHOUT COMPENSATION VIOLATES INTERNATIONAL LAW

I.

Decisional Law:

(a) *Permanent Court of International Justice:*

Certain German Interests in Polish Upper Silesia, P.C.I.J., ser. A, No. 7, at 21-22, 42 (1926).

Chorzow Factory, P.C.I.J., ser. A, No. 17, at 46-48 (1928).

(b) *International Arbitral Awards:*

Saudi Arabia v. *Arabian American Oil Co.*, (1956), in McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 218, 233-34 (1959).

De Sabla Claim (United States/Panama), 6 U.N. Rep. Int'l Arb. Awards 358, 366 (1933).

Goldenberg Case (Germany/Roumania), 2 U.N. Rep. Int'l Arb. Awards 901, 909 (1928).

Spanish Zone of Morocco Case (Great Britain/Spain), 2 U.N. Rep. Int'l Arb. Awards 615, 647 (1925).

Norwegian Shipowner's Claim (Norway/United States) (Perm. Ct. Arb. 1922) 1 U.N. Rep. Int'l Arb. Awards 307, 332, 334, 338-39.

Portuguese Religious Properties Case, 1 U.N. Rep. Int'l Arb. Awards 7 (Perm. Ct. Arb. 1920).

George W. Upton Claim (United States/Venezuela), RALSTON & DOYLE, VENEZUELAN ARBITRATIONS OF 1903, at 172 (1904).

Delagoa Bay Railway Case, 2 MOORE, DIGEST OF INTERNATIONAL ARBITRATION 1865 (1889-1891).

(c) *National Courts:*

Anglo-Iranian Oil Co. v. *S.U.P.O.R. Co.*, [1955] Int'l L. Rep. 23, 78 Il Foro Italiano Part I, 256 (1955) (Italy).

19 Entscheidungen des Verfassungsgerichtshofes 168, [1954] Int'l L. Rep. 212 (Austria).

Anglo-Iranian Oil Co. v. *Jaffrate (The Rose Mary)*, 1953 I Weekly L. R. 246, [1953] Int'l L. Rep. 316 (Aden).

Anglo-Iranian Oil Co. v. *Idemitsu Kosan Kabushiki Kaisha*, [1953] Int'l L. Rep. 312 (Japan).

Confiscation of Property of Sudeten Germans, see cases in Appendix I.

II.

Commentators:

Anderson, *Basis of the Law against Confiscating Foreign-Owned Property*, 21 AM. J. INT'L L. 525 (1927).

Anderson, *Title to Confiscated Foreign Property*, 20 AM. J. INT'L L. 528 (1926).

1 ANZILOTTI, COURS DE DROIT INTERNATIONAL, 473 (1929).

Audinet, *Le monopole des assurances sur la vie en Italie*, 20 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 5, 13 (1913).

Bellot, *The Protection of Private Property*, 4 REVUE DE DROIT INTERNATIONAL DE SCIENCES DIPLOMATIQUES ET POLITIQUES (SOTTILE) 3, 15 (1926).

Bindschedler, VERSTAATLICHUNGSMASSNAHMEN UND ENTSCHAEDIGUNGSPFLICHT NACH VOELKERRECHT (18 ZUERCHER STUDIEN ZUM INTERNATIONALEN RECHT) (1950).

Bindschedler, *La protection de la propriete privee en droit international public*, 90, III ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 173 (1956).

Birke, DIE KONFISKATION AUSLAENDISCHEN PRIVATVERMOEGENS IM HOHEITSBEREICH DES KONFISZIERENDEN STAATES NACH FRIEDENSVOELKERRECHT (42 VEROEFFENTLICHUNGEN DES INSTITUTS FUER INTERNATIONALES RECHT AN DER UNIVERSITAET KIEL) (1960).

Bullington, *Problems of International Law in the Mexican Constitution of 1917*, 21 AM. J. INT'L L. 685, 694 et seq., 703 (1927).

Cohn, *Expropriation of Foreign Nationals and the Military Government of the U.S.A. in Germany*, FESTSCHRIFT FUER LEWALD 459 (1953).

1 DAHM, VOELKERRECHT 511 *et seq.* (1958).

De Nova, *Voelkerrechtliche Betrachtungen ueber Konfiskation und Enteignung*, 52 DIE FRIEDENSWARTE 116 (1953-55).

Doman, *Compensation for Nationalised Property in Post-War Europe*, 3 INT'L L.Q. 323 (1950).

Doman, *Post-War Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125 (1948).

Drucker, *The Nationalisation of United Nations Property in Europe*, 36 TRANSACTIONS OF THE GROTIUS SOCIETY 75 (1951).

Fachiri, *International Law and the Property of Aliens*, 10 BRIT. YB. INT'L L. 32 (1929).

Fachiri, *Expropriation and International Law*, 6 BRIT. YB. INT'L L. 159 (1925).

Appendix II, p. 4

Fawcett, *Some Foreign Effects of Nationalization of Property*, 27 Brit. Yb. Int'l L. 355, 375 (1950).

Gidel, *L'arret No. 7 de la Cour Permanente de Justice Internationale*, 1 Revue de droit international 76 (1927).

Guggenheim, *Der voelkerrechtliche Schutz von Investitionen im Ausland*, 13 Schweizerisches Jahrbuch fuer Internationales Recht—Annuaire suisse de droit international 57 (1956).

1 Guggenheim, Lehrbuch des Voelkerrechts 303 (1948).

Heiz, Das fremde oeffentliche Recht im internationalen Kollisionsrecht (29 Zuercher Studien zum Internationalen Recht) 195 (1959).

Herz, *Expropriation of Foreign Property*, 35 Am. J. Int'l L. 243, 254 (1941).

Hyde, *Permanent Sovereignty over Natural Wealth and Resources*, 50 Am. J. Int'l L. 854, 864 (1956).

Kaeckenbeeck, *The Protection of Vested Rights in International Law*, 17 Brit. Yb. Int'l L. 1 (1936).

Kaufmann, *Regles generales du droit de la paix*, 54, IV Academie de droit international, Recueil des cours 309, 429 (1935).

Kuhn, *Nationalization of Foreign-Owned Property in its Impact on International Law*, 45 Am. J. Int'l L. 709 (1951).

Kunz, *The Mexican Expropriations*, 17 N.Y.U.L.Q. Rev. 327, 339 (1940).

Loewenfeld, *Der Schutz wohlerworbener Rechte von Auslaendern im Voelkerrecht* [1926] Juristische Wochenschrift 1895.

Loewenfeld, 33 Transactions of The Grotius Society 42 (1948).

Appendix II, p. 5

Mann, *Voelkerrechtswidrige Enteignungen vor nationalen Gerichten,* [1961] Neue Juristische Wochenschrift 705.

McNair, *The Seizure of Property and Enterprises in Indonesia,* 6 Nederlands Tijdschrift voor Internationaal Recht 218 (1959).

Moeller, International Law in Peace and War 133, 134 n.b. (1931).

Niederer, *Der Voelkerrechtliche Schutz des Privateigentums,* Festschrift fuer Lewald 547 (1953).

1 Oppenheim, International Law 268, 269 & n.1, 352 (8th ed, H. Lauterpacht, 1955).

Peselj, *International Aspects of the Recent Yugoslav Nationalization Law,* 53 Am. J. Int'l L. 428, 431 (1959).

Re, *The Nationalization of Foreign-Owned Property,* 36 Minn. L. Rev. 323 (1952).

Restatement, Foreign Relations Law of the United States §190 (Proposed Official Draft 1963).

Rolin, *(Avis de Monsieur le Professeur H. Rolin)* 6 Nederlands Tijdschrift voor Internationaal Recht 260, 268 (1959).

Rousseau, Principes generales du droit international 95 (1944).

Rubin, *Nationalization and Private Foreign Investment: The Role of Government,* 2 World Politics 482, 486 (1949-50).

2 Scelle, Precis de droit des gens. 110 *et seq.* (1934).

Schuecking, *Der Schutz der wohlerworbenen Rechte im Voelkerrecht,* Festgabe fuer Huber 198 (1934).

Schwarzenberger, *The Protection of British Property Abroad,* 5 Current Legal Problems 295 (1952).

Appendix II, p. 6

Seidl-Hohenveldern, *Confiscation and Expropriation Problems in International Law*, 83 JOURNAL DU DROIT INTERNATIONAL (CLUNET) 380, 439 (1956).

SEIDL-HOHENVELDERN, INTERNATIONALES KONFISKATIONS- UND ENTEIGNUNGSRECHT 43 (1952).

U.N. Publication: *The Status of Permanent Sovereignty Over Natural Wealth and Resources*, a Study by the Secretariat, U.N. Doc. No. A/AC. 97/5/ Rev. 2 at 92-99 (1962).

Vannon, FRAGEN DES INTERNATIONALEN ENTEIGNUNGS- UND KONFISKATIONSRECHTS (INSBESONDERE NACH SCHWEIZERISCHER PRAXIS) (28 ZUERCHER STUDIEN ZUM INTERNATIONALEN RECHT) (1959).

VEITH & BOECKSTIEGEL, DER SCHUTZ VON AUSLAENDISCHEM VERMOEGEN IM VOELKERRECHT (4 STUDIEN ZUM EUROPAEISCHEN WIRTSCHAFTSRECHT) (1962).

VERDROSS, VOELKERRECHT 289 *et seq.* (3d ed. 1955).

Verdross, *Zur Konfiskation auslaendischen Privateigentums nach Friedensvoelkerrecht*, 4 ZEITSCHRIFT FUER OEFFENTLICHES RECHT 321 (1924-25).

Verdross, *Les regles internationales concernant le traitement des etrangers*, 37, III ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 322 (1931).

Verzijl, *The Relevance of Public and of Private International Law Respectively for the Solution of Problems Arising from Nationalization of Enterprises*, 19 ZEITSCHRIFT FUER AUSLAENDISCHES OEFFENTLICHES RECHT UND VOELKERRECHT (FESTGABE FUER MAKAROV) 531, 536 (1958).

Vogel, *Der Schutz auslaendischer Vermoegensrechte gegen Verstaatlichungen*, 49 DIE FRIEDENSWARTE 197 (1949).

Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83 (1951).

Appendix II, p. 7

WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 152 (1959).

Wortley, *Expropriation in International Law*, 33 TRANSACTIONS OF THE GROTIUS SOCIETY 25, 31 *et seq.* (1948).

III.

International Agreements:

For an extensive list of bilateral agreements declarative of the requirement of compensation, see U.N. Publication: *The Status of Permanent Sovereignty Over National Wealth and Resources*, a Study by the Secretariat, U.N. Doc. No. A/AC. 97/5/Rev. 2 at 71-73 (1962). See also treaties cited in the *amicus* briefs for The Association of the Bar of the City of New York and The American Bar Association.

Relevant treaty provisions are also collected in:

Drucker, *Compensation Treaties Between Communist States*, 10 INT'L & COMP. L.Q. 238 (1961).

VEITH & BOECKSTIEGEL, DER SCHUTZ VON AUSLAENDISCHEM VERMOEGEN IM VOELKERRECHT, (4 STUDIEN ZUM EUROPAEISCHEN WIRTSCHAFTSRECHT) 61-76 (1962).

Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83 (1951).